IN THE UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA CIRCUIT

JAMAL KIYEMBA, et al., Appellees, v. GEORGE W. BUSH, et al., Appellants.	Appeal Nos. 08-5424, 08-5425, 08-5426, 08-5427, 08-5428 and 08-5429

APPELLEES' OPPOSITION TO GOVERNMENT'S MOTION FOR STAY PENDING APPEAL AND RESPONSE TO MOTION FOR EXPEDITED APPEAL

Eric A. Tirschwell
Michael J. Sternhell
Darren LaVerne
Seema Saifee
KRAMER LEVIN NAFTALIS & FRANKEL LLP
1177 Avenue of the Americas
New York, New York 10036

Elizabeth P. Gilson
383 Orange Street
New Haven, Connecticut 06511

J. Wells Dixon
CENTER FOR CONSTITUTIONAL RIGHTS
666 Broadway, 7th Floor
New York, New York 10012

Susan Baker Manning
Catherine R. Murphy
BINGHAM McCUTCHEN LLP
2020 K Street, N.W.
Washington, D.C. 20036

Sabin Willett
Neil McGaraghan
Rheba Rutkowski
Jason S. Pinney
BINGHAM McCUTCHEN LLP
One Federal Street
Boston, Massachusetts 02110

George Clarke
MILLER & CHEVALIER CHARTERED
655 15th Street, N.W., Suite 900
Washington, D.C. 20005

Angela C. Vigil
Baker & McKenzie LLP
Mellon Financial Center
1111 Brickell Avenue, Suite 1700
Miami, Florida 33131

PRELIMINARY STATEMENT

Given the rhetoric in the Government's stay motion ("Motion"), the Court may be surprised by the actual *record* in these cases. It shows an experienced district judge closely investigating public safety, and the Government presenting not a single fact suggesting any risk to that safety, let alone a risk justifying more imprisonment. Intervention through an extraordinary stay would invite the Government to prosecute Guantánamo *habeas* cases in the Court of Appeals, rather than the district court. This case is uniquely inappropriate for such a precedent. Its record provides no basis to avoid the mandate of *Boumediene v. Bush*, 128 S. Ct. 2229 (2008), for prompt determination, and a compelling one for the essence of *habeas corpus*: release. The public will be well protected by the district judge's imposition of monitoring conditions during expedited review of the merits here. Monitoring was to be addressed at the October 10 (and October 16) hearing that Judge Urbina previously ordered, and would ensure that Appellees be accountable to any orders that might follow a reversal on appeal.

Habeas is unique: stays exacerbate the substantive wrong. Their burden on noncombatants who stood within hours of freedom is obvious and poignant. Given the record here, a further stay would also impose an intolerable burden on a district court carrying out the duties imposed on it by *Boumediene* four months ago.

Appellees too are unique: they are not accused of taking up arms or even of antipathy toward the United States; the Government has conceded that they are not enemy combatants; they cannot be returned to their home country; and no other country will take them despite over four years of resettlement efforts. This case will open no "floodgates"—most non-combatants can be sent home.

FACTUAL AND PROCEDURAL HISTORY

Last June, Judge Urbina regained custody of Appellees' *habeas* cases. The oldest, *Kiyemba v. Bush*, No. 05-1509, dated from July 2005. As to ten Appellees, the Government never filed a *habeas* return.[1] One of the ten, Huzaifa Parhat, had obtained judgment in his proceeding under the Detainee Treatment Act of 2005, Pub. L. No. 109-148, 119 Stat. 2739 ("DTA"). *Parhat v. Gates*, 532 F. 3d 834 (D.C. Cir. 2008).[2] On July 23, Parhat filed a motion for judgment in his *habeas*

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[1] As to those ten it still has not. No *habeas* return was filed for Appellees Nasser (ISN 278), Semet (ISN 295), Memet (ISN 328), Parhat (ISN 320), Jalaldin (ISN 285), Ali (ISN 280), Osman (ISN 282), Ghaffar (ISN 281), Sabour (ISN 275), and Noori (ISN 584). The Government produced part of the "record on review" in some DTA cases, but these documents were not made part of the *habeas* record. *See* Ex. A at 1 (conceding that Appellees may use in *habeas* cases classified CSRT hearing records filed in their DTA cases, an action Appellees never needed to take because the Government never made a return or otherwise presented or contested facts). The Government filed a *habeas* return—in each case only the CSRT hearing record—for Appellees Mahnut (ISN 277), Mahmud (ISN 103), Mamet (ISN 102), Razakah (ISN 219), Tourson (ISN 201), Mohammad (ISN 250), and Thabid (ISN 289). As to those, the Government avoided any traverse by its September 30 concession that it would not contest that each was a noncombatant.

[2] Following the mandate of *Boumediene*, the Court held that Parhat was entitled to seek *habeas* relief immediately and that "*in that proceeding there is no question*

case, seeking immediate release into the United States, and an alternative motion for interim parole ("Release Motion"). Exhibit B. On August 4, 2008, the Government advised this Court that it would not convene a new CSRT for Parhat.

On August 21, Judge Urbina held a status conference. The Government conceded that four more Appellees would be treated as Parhat, and asked for time to consider its options as to the others. *See* Exhibit C (Aug. 21 Hrg. Tr. 9-11). The response was generous—the court gave the Government until September 30 (five weeks), and scheduled a hearing on the Release Motion for October 7. *Id.* at 51.

September came. Concerned lest the Government resume at the eleventh hour the rhetorical campaign it had waged against them, Appellees moved for leave to be present at the hearing (in person and/or by videoconference), to respond to any facts the Government might assert to justify their imprisonment or oppose their release. Ex. D. The Government objected, arguing that Appellees' presence "is utterly unnecessary for the Court to address the legal question" to be heard. Ex. E at 6. On September 30, as to every Appellee, the Government pleaded no contest to the sole basis for detention ever asserted previously: "enemy combatant" status. Ex. G. It filed no new returns, nor amended previous returns.[3]

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but that the court will have the power to order him released." *Id.* at 851 (emphasis supplied). In the plainest words, the Court directed the Government to "release Parhat, to transfer him, or to expeditiously convene a new CSRT." *Id.*

[3] The Government argues that the October 7 hearing involved only legal issues. Mot. 19 n.7. But Judge Urbina stated at the August 21 conference that the hearing

The Government thus abandoned the right to assert against Appellees any factual basis other than the one that was conceded, *viz.*, that they are aliens imprisoned at Guantánamo since 2002. The concession that the men are not enemy combatants (and the insistence that the Release Motion involved only legal issues), also eliminated any question whether Appellees were entitled to be present for the hearing, 28 U.S.C. § 2243 (cl. 3), to controvert any factual assertion the district court might nevertheless permit to be made against them, *id.* (cl. 5).[4]

The Release Motion was heard on October 7, nearly four months after *Boumediene* issued. Based on the Government's objections, *see* Ex. E, Appellees were not present. The court offered the Government a last chance—soliciting a factual proffer of "the security risk to the United States should these people be permitted to live here." Ex. H (Hrg. Tr. ("Tr.")) 15. The Government responded, "I don't have available to me today any particular specific analysis as to what the

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was on the Release Motion. Ex. C at 50-51. The Government precluded Appellees' participation by advising the court that only legal issues were involved, Ex. E at 6; a concession that, in turn, informed Judge Urbina's minute order, Ex. F. The Government never presented to the court any fact to which Appellees could respond concerning alleged "dangerousness."

[4] Each Appellee has the privilege of statutory as well as constitutional *habeas*. The "*habeas* strip" of 28 U.S.C. § 2241(e) never applied in the first place to persons not properly determined to have been "properly detained as an enemy combatant" or "awaiting such determination." That means that each Appellee was entitled to be present to contradict and refute evidence offered to justify imprisonment. 28 U.S.C. § 2243 (cl. 5). Each man asserted that right, and the Government objected, asserting that there were no factual issues in the case. Ex. E at 5-6.

threats of—from a particular individual might be if a particular individual were let loose on the street." Tr. 17. The Government offered no evidence.

The Government had "seven years to study this issue," Tr. 15, three years' notice of these *habeas* cases, ten weeks' notice of the Release Motion, and six weeks' notice of the hearing date on the motion. The district court never barred or denied any offer of the Government of a return, or indeed any evidence at all. (The court did require detailed proffers concerning the practical arrangements in place for release and resettlement, and as to who would host the men and where. Witnesses were present and ready to testify. The Government accepted the evidence by proffer and declined to challenge or cross-examine. Tr. 43-52.[5])

The record contained powerful evidence that Appellees' release would not threaten civilians. "Throughout this period," the court properly found, "the Government has been engaged in 'extensive diplomatic efforts' to resettle the petitioners." Op. 9. The Government described these efforts in 2005. *Qassim v. Bush*, 407 F. Supp. 2d 198, 200 (D.D.C. 2005). Classified declarations updated this information, and the Government publicly claimed its renewed effort to

[5] The suggestion that he was about to free the men carelessly, Mot. 19 n.7, does a gross disservice to Judge Urbina, omitting pages of context concerning the Government's provocative assertion that the men would be jailed upon arrival by a DHS that needed an additional week to consider its options. Tr. 46-52. Judge Urbina expressly retained the authority to set appropriate conditions when the Appellees arrived at his courtroom on October 10. Ex. I (October 8 release order stating that Judge Urbina intended to address release conditions on October 10).

resettle Appellees among civilians abroad.[6] It can hardly suggest that it was seeking to settle dangerous persons among civilian populations of U.S. allies.[7]

That was the record. In addition are matters of which the district court properly could take judicial notice. First was this Court's *Parhat* decision, which rejected the Government's best case[8] as to the propriety of Appellee Parhat's enemy-combatant status. Op. 2, 5, 9. The Government was ordered "to release Parhat, to transfer him, or to expeditiously convene a new [CSRT] to consider evidence submitted in a manner consistent with this opinion." 532 F.3d at 836. The district court also took judicial notice of the Government's concession to entry of identical judgments in four other Appellees' cases in September. Op. 3.[9]

The district court (i) properly concluded that there is no legal basis for the continued indefinite imprisonment of Appellees, Op. 8-9; and (ii) made a finding

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[6] Five companions of Appellees were sent to Albania in 2006; one reached Sweden in 2007. *See Qassim v. Bush*, No. 05-5477 (D.C. Cir. 2007). The Government does not and could not contend that their presence there has ever resulted in the slightest threat to the people of Tirana or Stockholm.

[7] On October 8, the Government itself destroyed whatever hope remained by its senseless libel—quite false, but now available to every foreign nation—that Appellees are terrorists. Oct. 8 Em'gcy Mot. for Stay 19. That they never were makes no difference to diplomacy. The United States has said it and cannot unsay it. The Government's position would consign Appellees to Guantánamo forever.

[8] Neither Parhat nor any other Appellee has ever been provided with the exculpatory materials required by this Court's decisions in *Bismullah v. Gates, in which Parhat and seven other Appellees were petitioners*.

[9] The Government was forced to make the concession or brief and argue the cases. No other DTA cases had reached the point of jeopardy.

of fact—unassailable on the record before it—that the Government "has presented no reliable evidence that Appellees would pose a threat to U.S. interests," Op. 9. Judge Urbina ordered that Appellees be brought to his courtroom at 10 a.m. on October 10, 2008 and that the local Uighur families who will care for them appear then as well, at which time he would address release conditions. Ex. I. He also set a further hearing for October 16, 2008 to address the Government's concerns about release conditions. *Id.* Judgment entered. That closed the record.

Now the cases are here on appeal. There is no mechanism for making a new record here.[10] As to most Appellees,[11] there is literally no *habeas* record at all. As to all, the Government rests in part on a purely legal theory that Appellees'

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[10] *See Ouimette v. Moran*, 942 F.2d 1, 12 (1st Cir. 1991) (government could not raise factual question for first time on appeal in a *habeas* case where it did not raise it in its return or at evidentiary hearing). This Court stated in *United States v. Booze*, 293 F.3d 516, 519 (D.C. Cir. 2002), that it "follows the general rule that issues and legal theories not asserted at the district court level ordinarily will not be heard on appeal," but "acknowledges that the rule should not be applied where the obvious result would be a plain miscarriage of justice." There, the Government asked the Court to order an evidentiary hearing in a case under 28 U.S.C. § 2255, and the Court considered it "lest a plain miscarriage of justice be the result." *Id.* The facts giving rise to a miscarriage of justice there are not present here. The Motion makes no such argument; nor could it, as its concession below blocked Appellees from offering evidence to show, *inter alia*, they are not "dangerous."

[11] Parhat is among the ten Appellees with no *habeas* return. His DTA case contains an incomplete record, as it was based on the Government's best case, which he never had any opportunity to controvert. No other Appellee has ever been afforded the opportunity to controvert that *habeas* would have secured to him, had the Government ever offered a record below supporting its new argument that Appellees are subject to further detention. 28 U.S.C. § 2243 (cl. 4).

conceded alien status bars relief. In every other particular, the Government's position as to a stay rests on "factual" allegations *that either are not in the habeas record at all*, or that the Government is precluded from resting on now, having abandoned its "enemy combatant" theory and barred Appellees from responding.

ARGUMENT

A. The Government's Insuperable Burden

Two procedural obstacles bar relief: the standard of review, which receives little attention in the Motion, and the absence of a factual record upon which this Court might base an extraordinary stay.

1. Standard of review

The operative rule directs that "[w]hile a decision ordering the release of a [*habeas*] petitioner is under review, the prisoner must—unless the court or judge rendering the decision, or the court of appeals, or the Supreme Court, or a judge or justice of either court orders otherwise—be released on personal recognizance, with or without surety." Fed. R. App. P. 23(c). The rule "creates a presumption of release from custody" pending appellate review. *Hilton v. Braunskill*, 481 U.S. 770, 774 (1987). Fed R. App. P. 24(d) also "creates a presumption of correctness" as to a district court's release order, which can be overcome only upon "special reasons shown." *Id.* In *Hilton*, the Supreme Court considered a stay in a *habeas* case, holding that courts should "be guided not only by the language of [Rule 23(c)] itself but also by the factors traditionally considered in deciding whether to

stay a judgment in a civil case"—(i) likelihood of success on the merits; (ii) irreparable injury to movant absent a stay; (iii) substantial injury to other parties by issuance of stay; and (iv) the public interest. 481 U.S. at 777.

2. The record contains no fact demonstrating irreparable harm and the Government has waived any right to present facts now.

In *habeas*, a return serves as an answer. It must "certify[] the true cause of the detention." 28 U.S.C. § 2243 (cl. 3). It is the only vehicle by which the Government puts in play its factual basis for detention. Failure to make a return is, effectively, a waiver of any factual contest.[12] The Government conceded as much on September 30, and in insisting that the Release Motion involved only legal issues. Filing of a return affords the petitioner the right to "deny any of the facts set forth in the return or allege any other material facts." 28 U.S.C. § 2243 (cl. 6). Withholding the return denies that opportunity. This is what happened here.

The Government cannot be permitted to game the district court this way, or be allowed to rely upon untested extra-record assertions as a basis for reversal. The only facts on which it may rely here are the ones conceded; that Appellees are aliens, and have been imprisoned at Guantánamo since 2002. Thus, arguments for

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[12] *See National Wildlife Fed'n v. Burford*, 835 F.2d 305, 318 (D.C. Cir. 1987) (stating the rule that "issues and legal theories not asserted at the district court level will not be heard on appeal" and that "our procedural scheme contemplates that parties shall come to issue in the trial forum vested with authority to determine questions of fact") (alteration omitted) (citing, *inter alia*, *Hormel v. Helvering*, 312 U.S. 552, 556 (1941)). There is no basis to depart from the rule in a case involving more than six years of executive detention.

a stay that themselves are grounded in assertions as to harms or threat to national security are barred. *Burford*, 835 F.2d at 318; *Ouimette*, 942 F.2d at 12. Such facts could have been asserted in a return, or even in response to Judge Urbina's invitation, and then controverted, and Judge Urbina could then have made a finding based on a full record. But no facts were offered.

B. The Government Has Not Met Its Burden To Justify A Stay.

With the difficulty of the Government's burden and the emptiness of the record in mind, the Court may consider the *Hilton* factors.

1. The Government cannot meet its burden to demonstrate a substantial likelihood of success on the merits.[13]

To meet its burden, the Government must demonstrate at least a "substantial case on the merits." *Hilton*, 481 U.S. at 778. The Government's theory throughout this litigation has been that the men are being properly held as enemy combatants. *Cf. Hamdi v. Rumsfeld*, 542 U.S. 507 (2004). When this theory was abandoned on September 30, no other concept was advanced in its stead. The Government did not argue below, and cannot argue here, that it may simply deem a person "dangerous" (whatever that means) and imprison him indefinitely on that basis.

[13] A more complete discussion of the merits appears in the Release Motion (attached as Exhibit B) and reply (attached as Exhibit J).

The record contains no return advancing so remarkable an idea, and the law affords none.[14] The Government cannot prevail on the merits based on this new theory.

The Government's central preserved argument on the merits—that Appellees' alien status bars a *habeas* remedy as a matter of immigration law—cannot survive *Boumediene*'s Suspension Clause holding. Here, as in *Boumediene*, the Government proffers an Act of Congress as a bar to *habeas* relief. In *Boumediene*, it was the Military Commissions Act; here, a suite of immigration statutes. Mot. 13-14. It says that in these statutes, Congress forbade the only *habeas* relief available here. But Congress had no power to do so under *Boumediene*, and a long line of decisions such as *INS v. St. Cyr*, 533 U.S. 289 (2001), direct that statutes be construed to avoid interfering with the constitutional

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[14] *E.g.*, *Clark v. Martinez,* 543 U.S. 371 (2005) (convicted criminals with no entry right must be released into population); *Tran v. Mukasey*, 515 F.3d 478, 486 (5th Cir. 2008) ("While this Court is sympathetic to the Government's concern for public safety, we are without power to authorize [petitioner's] continued detention."); *Nadarajah v. Gonzales*, 443 F.3d 1069, 1083-84 (9th Cir. 2006) (alien released from five-year detention despite security-risk argument); *Hernandez-Carrera v. Carlson*, 546 F. Supp. 2d 1185, 1190-91 (D. Kan. 2008) ("If further detention of aliens with mental illness or threat of violence is required to protect public safety, rather than the supervised release which is currently authorized, Congress has not yet acted to provide such additional protection."); *see also Hussain v. Mukasey*, 518 F.3d 534, 539 (7th Cir. 2008) (alien found to have engaged in terrorist activities under 8 U.S.C. § 1182 "has been in custody for more than two and a half years" and "since he cannot at present be removed from the United States because of the Board's ruling on the Convention Against Torture, the six-month presumptive limitation on detaining an alien now begins to run").

privilege of *habeas corpus*. After *Boumediene*, no immigration statute can have deprived Appellees of their *habeas* remedy, and the appeal must fail.[15]

Even before *Boumediene*, Supreme Court precedents granted release to aliens who, like Appellees, had never made an entry, *see Clark*, 543 U.S. at 386, or whom the INS found either inadmissible or removable, and who could not find another country willing to accept them, *id.*; *Zadvydas v. Davis*, 533 U.S. 678, 699-700 (2001). In both cases, the Supreme Court ordered the release of aliens into the United States, notwithstanding (as the Government argues is true of Appellees) that they had no legal entitlement to be here. *Id.* The rule of each case is that *no* statute can be read to permit indefinite imprisonment—even if it deals with alien criminals and appears on its face to authorize their indefinite imprisonment.

The Government argues that Appellees are inadmissible because they sought "to commit terrorist acts against a sovereign Government" and "receive[d] weapons training for the purpose of doing so." Mot. 13-14 (citing 8 U.S.C. § 1182(a)(3)(B)).[16] Assuming, *arguendo*, that 8 U.S.C. § 1182 renders Appellees

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[15] The Government argues that *Boumediene* "recognized that release . . . is not the appropriate [remedy] in every case in which the writ is granted." Mot. 15 (internal quotations and citation omitted). *Boumediene* cited three authorities: two holding that the prisoner must be released, and *Chessman v. Teets*, 354 U.S. 156 (1957), ordering remand for retrial, where the *habeas* petitioner had demonstrated *an error of law in the trial*. *Boumediene*, 128 S. Ct. at 2266-67. Plainly it was to that latter scenario that the phrase "not the appropriate one in every case" refers.

[16] In three years of litigation, the Government never before alleged terrorist activity or intent. No record supports the allegation here.

inadmissible and thus detainable pending removal, *Clark* and *Zadvydas* compel their release into the United States now. 8 U.S.C. § 1231(a)(6), does not authorize indefinite detention of aliens inadmissible under section 1182. *Clark*, 543 U.S. at 377-78; *Zadvydas*, 533 U.S. at 682. *Clark* permits only a six-month detention beyond the 90 days for aliens inadmissible under section 1182. 543 U.S. at 386; *see* 8 U.S.C. § 1226a(a)(6) ("[l]imitation on indefinite detention"). Once removal is not "reasonably foreseeable," as here, the Government must release the alien. *Clark*, 543 U.S. at 377-78; *Zadvydas*, 533 U.S. at 701.

The Government also argues that Congress authorized detention of aliens "for extended periods if there are reasonable grounds to believe that those aliens are inadmissible under 8 U.S.C. § 1182(a)(3)(B) or otherwise pose a danger to national security." Mot. 14 (citing 8 U.S.C. § 1226a(a)(1), (3)). But the Government bases its entire inadmissibility argument on the assertion that Appellees were enemies of *China*, and further detention based on sections 1226a(a)(1) and (3) is authorized only where release will threaten "the national security of the *United States*" or "the safety of the community or any person." The Government's arguments for further detention fail, particularly when the statute is construed in light of constitutional considerations.

The Government's reliance on *Shaughnessy v. United States ex rel. Mezei*, 345 U.S. 206, 215-16 (1953), is unavailing. "[B]ecause the [Supreme] Court

accepted the Government's unsupported allegations as true, the *Mezei* Court's determination regarding continued detention is categorically different from the determination facing this court." Op. 8. In *Parhat*, this Court determined that *the Government's evidence provided no basis for Parhat's imprisonment*, 532 F.3d at 846-47, and the Government then waived litigation of this issue as to all Appellees.

Further, Mezei "came voluntarily to the United States, seeking admission," Op. 8, while Appellees were abducted by profit-seeking Pakistani bounty hunters, sold to the U.S. military, and brought by force to Guantánamo. One who comes to the threshold and is stranded is not like one brought by the Government against his will to a U.S. military base. *Zadvaydas*, 533 U.S. at 693 (Mezei "was 'treated,' for constitutional purposes, 'as if stopped at the border,'" "[a]nd that made all the difference") (citation omitted). The Executive cannot create the dilemma, and then complain that its own discretionary authority over immigration bars a solution.

At least in the narrow context presented by this case, where the Government has created its own dilemma, *Mezei* cannot override *Boumediene*'s core principle that the Constitution's design demands effective *habeas* review of unwarranted Executive intrusion into liberty. This principle—the central focus of section III.A of *Boumediene* and of the authorities there cited, *see* 128 S. Ct. at 2244-46—is lost without the remedy of release. "[T]he writ of *habeas corpus* is itself an indispensable mechanism for monitoring the separation of powers. The test for

determining the scope of this provision must not be subject to manipulation by those whose power it is designed to restrain." *Id.* at 2259.

To carry its burden to justify a stay, the Executive must persuade the Court that it will ultimately succeed in showing that it is entitled to treat the Constitution's commands as a suggestion. But its position on the merits that even after a *habeas* court has reached a final judgment, the Executive nonetheless may exercise unilateral discretion as to what to do with the petitioner refutes itself.[17]

2. The Government has not demonstrated irreparable harm.

The Motion asserts three "harms:" (i) that the Government is correct on the merits; (ii) that the Release Order will give Appellees a United States presence to which they are not entitled; and (iii) that Appellees are dangerous. None of these theories can establish irreparable harm to the Government.

The Merits. The Government's claims that the release order "impinges on the political branches' exclusive constitutional and statutory authority over the admission of aliens into the United States, and over the winding up of the detention of former enemy combatants," Mot. 18, merely restates its legal position. It does

[17] *See Plaut v. Spendthrift Farm, Inc.*, 514 U.S. 211, 219 (1995); *United States v. Nixon*, 418 U.S. 683, 703-05 (1974).*Chicago & Southern Air Lines v. Waterman S. S. Corp.*, 333 U.S. 103, 113 (1948); *Hayburn's Case*, 2 U.S. 408, 410 (1792).

not demonstrate irreparable harm. If an adverse legal ruling, without more, constitutes irreparable harm, any legal ruling would justify a stay.[18]

Presence. The Government contends that releasing Appellees into the United States would "cloud" their present status. This is inaccurate. Their status will be as clear as that of the many aliens released since *Clark v. Martinez*. And that "cloud," even if it existed on an interim basis, would hardly be harm so irreparable as to overcome the harm of imprisonment without lawful basis. People without right to be here cross our borders daily in great numbers, almost always without the support in place that has been arranged for Appellees; never with precise Government knowledge of who and where they are; and never with the full support and urging of the Chairman and Ranking Member of the relevant congressional oversight committee.[19] And the record shows that release will cause no financial burden—indeed, Appellees will relieve the Government from expense.

Dangerousness. The Government's real claim is that "compliance with the district court's order would pose a serious security risk." Mot. 19. As to ten

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[18] The Government contends that any decision that "interfere[s] with Executive authority constitutes irreparable harm." Mot. 18. The cited cases state that "separation-of-powers considerations should inform a court of appeals' evaluation of a mandamus petition," *Cheney v. United States Dist. Ct.*, 542 U.S. 367, 382 (2004); *see Ex parte Peru*, 318 U.S. 578, 588 (1943), not that irreparable harm is shown by an argument that a court's decision interferes with executive authority.

[19] *See* Ex. K (letter from the Chairman and Ranking Member of the House Subcommittee on International Organizations, Human Rights, and Oversight requesting that Appellees "promptly be paroled into the United States").

Appellees, no record exists that could possibly support this, because there was no return. As to the others, there *is* a record that overwhelmingly disproves such a risk, and provides no basis upon which this Court might reverse the finding below.

For four years (and even this month), the Government offered evidence that it has considered these men suitable for resettlement in civilian populations of the Nation's allies. It advised the court, "I don't have available to me today any particular specific analysis as to what the threats of—from a particular individual might be if a particular individual were let loose on the street." Tr. 15. The court found, based on the record, that the Government "has presented no reliable evidence that [Appellees] would pose a threat to U.S. interests." Op. 12. Nothing in the record could possibly support reversal of this finding, and it precludes a stay.

There is no record evidence that any Appellee was involved in what the Government, in support of its newly minted theory seeking a stay from this Court, calls an "organized" attempt to attack a "sovereign Government" (*i.e.*, China). Mot. 1, 13. *Compare Parhat*, 532 F.3d at 838 (Government's own record showing no more than an aspiration to one day join a resistance against China).[20]

[20] *Parhat* made no finding as to a link between Parhat and "ETIM," and none was proved (or sought to be proved) below. Appellees were captured long before ETIM was deemed a "terrorist organization" for certain immigration purposes. As early as 2003, for ten of the men, and continuing through May 2008 for the rest, the military concluded that Appellees should be released. Op. 3.

There is evidence that some Appellees[21] obtained "firearms training" (*i.e.*, some were shown how to break down a rifle, and some shot one or two bullets at a target). So have millions of American civilians, and hundreds of thousands of servicemen and women.[22] Firearms training in 2001 by Chinese dissidents in pre-war Afghanistan, where automatic weapons were ubiquitous, is not evidence of dangerousness in 2008.[23] There is no record evidence that Appellees now harbor hostility against the United States that renders them a danger to the public, and the district court so found.[24] Op. 12. As to Parhat (who is materially indistinguishable

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[21] As to the nine Appellees who have no return other than Parhat, nothing in this record could support a finding of firearms training.

[22] It is especially paradoxical for the Government to suggest that merely being trained to fight against another country disqualifies a person for U.S. admission. The Government expedites immigration benefits (including citizenship) for aliens with firearms training—*i.e.*, by joining the military. *E.g.*, 8 U.S.C. § 1440 (expedited naturalization for military service during hostilities); Exec. Order No. 13269, 67 Fed. Reg. 130 (July 8, 2002) (non-citizen active-duty soldiers immediately available for naturalization); P.L. 108-136, § 1701(a), 117 Stat. 1392 (2003) (reducing time of service required for naturalization).

[23] Judge Urbina stated that he "recognizes that the petitioners acquired weaponry skills at 'training camps' in Afghanistan after fleeing China, but will not draw adverse inferences based on other unsubstantiated allegations." Op. 3.

[24] A U.S. military official stated that Appellee Hassan (ISN 250)—even after years in U.S. captivity—"ha[s] not developed any animosity towards the U.S. or Americans in general, and ha[s] great admiration for such a wonderfully democratic society, where human rights are protected and people are allowed to live their lives peacefully, with no threat of mistreatment." Pet'n for Original Writ of *Habeas Corpus* (Declassified), *In re Petitioner Ali*, Sup. Ct. Dkt. No. 06-1194 (filed February 12, 2007) at 21 n.19 (citing Thabid, 05-2398, Dkt. 27 at 81 (classified factual return)). The Government's allegations do not prove a threat to the United States, or even make an alien inadmissible. *Cheema v. Ashcroft*, 383

from the other Appellees), this Court has already concluded, "It is undisputed that he is not a member of al Qaida or the Taliban, and he has never participated in any hostile action against the United States or its allies." *Parhat*, 532 F.3d at 835-836.

On this record, Judge Urbina's finding, in ordering a hearing to set release conditions (which we expect would include an outright ban on possession of a firearm, among other restrictions), that "[t]he government has not charged [Appellees] with a crime *and has presented no reliable evidence that they would pose a threat to U.S. interests*," Op. 12 (emphasis supplied), cannot be reversed.

3. A stay would cause substantial harm to Appellees.

The ongoing harm to Appellees is profound and obvious.[25] They remain in prison, monitored by soldiers and cameras, unable to communicate except by permission of the Department of Defense, and subject at the whim of the base commander to be sent back to solitary confinement. The Supreme Court has already balanced the harms of delay, ruling that Appellees were "entitled to a prompt *habeas corpus* hearing" and that "*the costs of delay can no longer be borne by those who are held in custody.*" *Boumediene*, 128 S. Ct. at 2275 (emphasis supplied). Imprisonment—particularly unlawful imprisonment—is a harm that overwhelms the theoretical and unsupported claims of harm advanced by the

---

F.3d 848, 858 (9th Cir. 2004) ("We cannot conclude automatically that those individuals who are activists for an independent Tibet are necessarily threats to the United States because they have been labeled by China as insurgents.").

[25] *See* Opposition to Emergency Motion for Stay 5-6, 18-19.

Government. *Hilton*, 481 U.S. at 777 (characterizing as "always substantial" the "interest of the *habeas* petitioner in release pending appeal"); *United States v. Bogle*, 855 F.2d 707, 710-11 (11th Cir. 1988); *Hernandez-Carrera v. Carlson*, No. 05-3051-RDR, 2008 WL 956742, at *1 (D. Kan. Apr. 7, 2008).

4. The public interest weighs in favor of denying a stay.

A six-and-one-half year imprisonment to which the Executive pleads no contest reflects badly on the Nation. The sunshine of judicial scrutiny in cases like *Parhat* and *Kiyemba* has just begun. The public will be ill served if the "judicial imperative" of a *habeas* remedy, *see Murray v. Carrier*, 477 U.S. 478, 505 (1986), is hamstrung by more stays. And the district court is poorly served by rewarding with stays litigants who withhold from it facts they argue on appeal are necessary to decide *habeas* cases. The public interest weighs strongly against further delay.

CONCLUSION

The Motion should be denied.[26]

Respectfully submitted,

Eric A. Tirschwell [Bar No. 43437]
Michael J. Sternhell [Bar No. 51092]
Darren LaVerne [Bar No. 51295]
Seema Saifee [Bar No. 51091]
KRAMER LEVIN NAFTALIS
& FRANKEL LLP

Susan Baker Manning [Bar. No. 50126]
Catherine R. Murphy
BINGHAM McCUTCHEN LLP
2020 K Street N.W.
Washington, D.C. 20006
Telephone: (202) 778-6150

[26] Appellees do not object to the request to expedite the appeal. The request to prolong the administrative stay should be denied for the reasons stated.

1177 Avenue of the Americas
New York, New York 10036
Telephone: (212) 715-9100
Facsimile: (212) 715-8000
Counsel to Appellees Abdul Razakah, Ahmad Tourson, Abdul Ghaffar, and Adel Noori

Elizabeth P. Gilson
383 Orange Street
New Haven, Connecticut 06511
Telephone: (203) 777-4050
Facsimile: (203) 787-3259
Counsel for Appellees Bahtiyar Mahnut and Arkina Amahmud

J. Wells Dixon [Bar No. 51138]
CENTER FOR
CONSTITUTIONAL RIGHTS
666 Broadway, 7th Floor
New York, New York 10012
Telephone: (212) 614-6464
Facsimile: (212) 614-6499

Counsel for All Uighur Appellees

Facsimile: (202) 778-6155

Sabin Willett [Bar No. 50134]
Neil McGaraghan [Bar No. 50530]
Rheba Rutkowski [Bar No. 50588]
Jason S. Pinney, [Bar No. 50534]
BINGHAM McCUTCHEN LLP
One Federal Street
Boston, Massachusetts 02110
Telephone: (617) 951-8000
Facsimile: (617) 951-8736
Counsel for Appellees Abdul Nasser, Abdul Sabour, Abdul Semet, Hammad Memet, Huzaifa Parhat, Jalal Jalaldin, Khalid Ali, Sabir Osman, and Edham Mamet

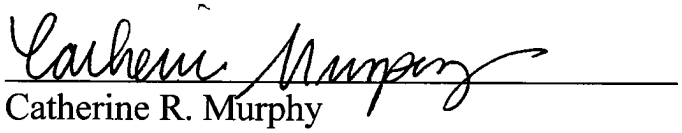
George Clarke [Bar No. 50855]
MILLER & CHEVALIER
CHARTERED
655 15th Street, N.W., Suite 900
Washington, D,C. 20005
Telephone: (202) 626-1573
Facsimile: (202) 626-5801

Angela C. Vigil [Bar No. 50873]
Baker & McKenzie LLP
Mellon Financial Center
1111 Brickell Avenue, Suite 1700
Miami, Florida 33131
Counsel for Appellees Ali Mohammad and Thabid

CERTIFICATE OF SERVICE

I hereby certify that on October 14, 2008, copies of the foregoing **Appellees' Opposition To Government's Motion For Stay Pending Appeal And Response To Motion For Expedited Appeal** were served via electronic mail and hand delivery upon:

Gregory G. Katsas
Jonathan F. Cohn
Thomas M. Bondy
Sharon Swingle
Catherine Hancok
U.S. Department of Justice
950 Pennsylvania Avenue, N.W.
Room 7250
Washington, DC 20530



Catherine R. Murphy

EXHIBIT A

IN THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF COLUMBIA

IN RE:	Misc. No. 08-442 (TFH)
GUANTANAMO BAY DETAINEE LITIGATION	Civ. Action No. 05-1509 (RMU) Civ. Action No. 05-1602 (RMU) Civ. Action No. 05-1704 (RMU) Civ. Action No. 05-2370 (RMU) Civ. Action No. 05-2386 (RMU) Civ. Action No. 05-2398 (RMU)

RESPONDENTS' RESPONSE TO UIGHUR PETITIONERS' MOTION TO USE CSRTS PROVIDED IN DTA ACTION IN THIS CASE

Petitioners on this motion are nine Uighurs, an ethnic Muslim minority from the northwestern Chinese province of Xinjiang. Each has been adjudicated an enemy combatant by a Combat Status Review Tribunal (CSRT) and is currently being detained at Guantanamo Bay. These nine petitioners seek to use in their respective habeas actions the classified evidentiary records provided to their respective CSRTs, records that have been previously disclosed in the petitioners' parallel actions under the Detainee Treatment Act of 2005, Pub. L. No. 109-148, 119 Stat. 2680 (2005) (DTA).[1] As these petitioners candidly admit, they seek to use these records so that they may attempt to mirror in their habeas actions the apparent success of a fellow Uighur in Parhat v. Gates, 2008 WL 2576977 (D.C. Cir. June 20, 2008), a non-habeas case under the DTA. Pets.' Mot. at 2-3. Subject to adherence to the standard protective orders entered in each of the habeas cases, respondents agree that these petitioners may use the classified CSRT records

[1] An additional four Uighurs have had their classified CSRT records filed in their habeas cases. Uighur Pets.' Mot. To Use CSRTS Provided in DTA Actions In This Case (Pets.' Mot.) at 3. Four others have never had access to their classified CSRT records. Id.

already filed in their DTA action here in their habeas cases, as long as that is done in a manner consistent with the protective orders.

To the extent petitioners, by this motion, also seek to limit respondents' factual returns in these cases to just the classified CSRT records, see Pets.' Mot. at 4, n.1 ("To be clear, this is the exact same document, the CSRT record, that Petitioners would have received as a factual record in this case had Respondents produced one."), however, respondents do not agree and hereby oppose. Since the Supreme Court's decision in Boumediene v. Bush, 128 S.Ct. 2229 (2008), respondents have consistently taken the position before this Court that they must be allowed to amend, as appropriate, any previously submitted factual returns to make the best case possible for the continued detention of these adjudicated enemy combatants. In many, if not all, of the cases in which a factual return has previously been filed, those returns were submitted years ago. At the time, those factual returns often consisted of just the CSRT record and nothing more. But things change, and respondents are entitled to put before the Court the best information they have that justifies the detention of these enemy combatants. Further intelligence information about detainees may have been acquired since the time the CSRT records were filed, for example. As importantly, the legal framework and burdens of proof have been altered by the courts, as Boumediene and Parhat demonstrate. Boumediene, 128 S.Ct. at 2271 (ruling that aliens held at Guantanamo Bay as enemy combatants are entitled to seek the writ of habeas corpus); Parhat, 2008 WL 2576977 at * 11-13 (ruling that a statutory rebuttable presumption establishing that the government's evidence in a CSRT record is genuine and accurate still required the government to disclose the source of intelligence information so that its reliability may be assessed). Thus, information that may have been excluded from the CSRT records as unnecessary or as a security

risk at the time may now be appropriate to establish the validity of detention. By the same token, information included in a CSRT record previously might now be deemed not to be appropriate to be included in a factual return. Accordingly, this Court has recognized that respondents at least have a right to seek to amend previously filed factual returns. Order, July 11, 2008, at 3-4.

Parhat itself fully supports the government's right to submit information beyond that submitted to a CSRT. There, under the DTA, the District of Columbia Circuit reviewed a CSRT's determination that the petitioner was an enemy combatant. 2008 WL 2576977 at * 1. Pursuant to the DTA, this review was limited to whether the CSRT's finding that an alien is an enemy combatant was consistent with the standards and procedures for that determination as specified by the Secretary of Defense, and to whether the Secretary's standards and procedures are consistent with the Constitution and laws of the United States. Pub. L. No. 109-148, § 1005(e)(2)(C). Applying this standard, the Court held that the CSRT's reliance on unsourced intelligence products violated the Secretary's instructions to verify the reliability of certain evidence submitted to it. 2008 WL 2576977 at * 11-13. Without that evidence, the Court found that the government could not establish two of the three prongs necessary to establish that the petitioner was an enemy combatant. Id. at *9-12. Consequently, the Court vacated the determination that Parhat was an enemy combatant. Id. at *14-15. But refusing to order that the Uighur petitioner's release was the only appropriate relief, the court chose rather to allow the government the option of providing that petitioner another CSRT using additional, reliable evidence not presented to the first tribunal. Id. Thus, even the decision relied on by petitioners here to justify their use of the classified CSRT records stands for the proposition that the government should not be restricted solely to that information.

Accordingly, respondents respectfully request that the Court deny this motion insofar as it can be read as seeking to restrict respondents' factual returns to just the classified CSRT records in these cases.

CONCLUSION

Respondents do not object to the use by the nine petitioners in their respective habeas cases of the their previously disclosed classified CSRT records, subject to the terms of the applicable protective orders. To the extent that the motion seeks to limit the respondents' factual returns in these cases to these records, however, respondents respectfully request that the motion be denied.

Dated: August 1, 2008

Respectfully submitted,

GREGORY KATSAS
Assistant Attorney General

JOHN C. O'QUINN
Deputy Assistant Attorney General

/s/ Ronald J. Wiltsie
JOSEPH H. HUNT (D.C. Bar No. 431134)
VINCENT M. GARVEY (D.C. Bar No. 127191)
JUDRY L. SUBAR (D.C. Bar No. 347518)
TERRY M. HENRY
ANDREW I. WARDEN
RONALD J. WILTSIE (D.C. Bar No. 431562)
Attorneys
United States Department of Justice
Civil Division, Federal Programs Branch
P.O. Box 883
Washington, DC 20044
Tel: (202) 514-3969

Attorneys for Respondents

EXHIBIT B1

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

IN RE: GUANTANAMO BAY DETAINEE LITIGATION	Misc. No. 08-442 (TFH)
JAMAL KIYEMBA, AS NEXT FRIEND OF ABDUSABUR DOE, et al., Petitioners, v. GEORGE W. BUSH, et al., Respondents.	Civil Action No. 05-1509 (RMU)

MEMORANDUM OF POINTS AND AUTHORITIES IN SUPPORT OF HUZAIFA PARHAT'S MOTION FOR JUDGMENT ON HIS *HABEAS* PETITION ORDERING RELEASE INTO THE CONTINENTAL UNITED STATES

Susan Baker Manning
Catherine R. Murphy
BINGHAM McCUTCHEN LLP
2020 K Street, NW
Washington, DC 20006

Sabin Willett
Neil McGaraghan
Rheba Rutkowski
Jason S. Pinney
BINGHAM McCUTCHEN LLP
One Federal Street
Boston, MA 02110-1726

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INTRODUCTION

All that is left of this *habeas* case is the elemental question of *habeas corpus* itself – remedy.

Huzaifa Parhat[1] is a stateless refugee who fled Chinese communism eight years ago. Respondents brought him to the Guantánamo Bay prison in 2002. For more than six years he was imprisoned under the legal theory that he is an "enemy combatant" of this Nation. Since June 20, 2008, he has been held under no legal authority whatsoever. On that day, the D.C. Circuit Court of Appeals, after a close review of his DTA case, concluded that the government's record does not support the conclusion that he is an enemy combatant. *Parhat v. Gates*, No. 06-1397, 2008 WL 2576977, *1 (D.C. Cir. June 20, 2008). It held that he had the right "to seek release immediately" in this Court, *id.*, observing that in this *habeas* proceeding, "*there is no question but that the court will have the power to order him released*," *id.* at *15 (emphasis supplied).

All other potential remedies for Parhat's grinding and illegal imprisonment were exhausted years ago. He is entitled to relief, and there is no relief – except an order that he be released into the continental United States.

PROCEDURAL HISTORY

Parhat was transported to Guantánamo Bay in 2002. In 2003, a military officer recommended that he be released. *Parhat*, 2008 WL 2576977 at *3. In 2004, a Combatant Status Review Tribunal ("CSRT") panel determined that there was no evidence to show that he had committed any hostile acts against the United States or its coalition partners, or that he had joined any group hostile to the U.S., but nevertheless deemed him an "enemy combatant." Other CSRT panels ruled that five of his companions in Afghanistan were not enemy combatants. *See*

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[1] Parhat is one of the *Kiyemba* petitioners. He submits this memorandum of points and authorities in support of his Motion for Immediate Release ("Motion"). Twelve other petitioners in these consolidated cases are factually situated precisely as was Parhat, and the legal situation of all the Uighur petitioners is identical. Only Parhat's case under the Detainee Treatment Act of 2005 ("DTA") has been decided.

Qassim v. Bush, 407 F. Supp. 2d 198, 199 (D.D.C. Dec. 22, 2005).

The Habeas Corpus Petition. On July 29, 2005, Parhat and eight other Uighurs imprisoned at Guantánamo sought *habeas corpus* relief in *Kiyemba v. Bush*, No. 05-1509 RMU. This Court directed that the government not transfer Parhat out of its jurisdiction without giving advance notice, but otherwise stayed the case. Mem. Order at 2-3 (D.D.C. Sept. 13, 2005) [Dkt. No. 8]. The government never provided any factual return to justify his imprisonment. On July 10, 2008, Judge Hogan ordered the *Kiyemba* case and the *habeas corpus* cases of other Uighurs consolidated before Judge Urbina. Dkt. No. 123.

The DTA Litigation. On December 4, 2006, Parhat filed a petition under the DTA. A year of litigation ensued over the record. Nominally Parhat prevailed, *see Bismullah v. Gates*, 514 F.3d 1291 (D.C. Cir. 2008), but in the looking-glass world of Guantánamo litigation, victory was meaningless. The government never provided him with the record as defined by the Court of Appeals, and indeed provided no record at all until October 29, 2007. On January 4, 2008, relying on the government's version of the record, Parhat moved for judgment, arguing that it contained no evidence justifying his detention as an enemy combatant. On June 20, 2008, the D.C. Circuit agreed. *Parhat*, 2008 WL 2576977 at *5.

The government's case was premised on a theory that Parhat *allegedly* was affiliated with a group (the "East Turkistan Islamic Movement" or "ETIM") that *allegedly* was associated with al Qaida or the Taliban and *allegedly* engaged in hostilities against the U.S. or its allies. *Parhat*, 2008 WL 2576977 at *7. Noting the CSRT's conclusion that there was no source evidence that Parhat had ever joined ETIM, the Court declined to reach that question because of fundamental flaws in the other elements of the government's theory. *Id.* at *17-18. Specifically, the Court noted that the government's "evidence" was derived entirely from four intelligence reports describing ETIM's "activities and relationships as having 'reportedly' occurred, as being 'said to' or 'reported to' have happened, and as things that are 'suspected of' having taken place." *Id.*

at *23.[2] But because the reports failed to identify any underlying source[3] for who may have "reported," "said," or "suspected" such things, the Court found the reports inherently unreliable. *Id.* at *24. The Court held that, as a matter of law, the government's "bare assertions cannot sustain the determination that Parhat is an enemy combatant." *Id.* at *24.

Turning to the question of remedy, and noting that the DTA provides no explicit remedy, the Court ordered the government to release or to transfer[4] Parhat, or to expeditiously hold a new CSRT consistent with its opinion. 2008 WL 2576977 at *14. The Court was at pains, however, to note that *this* Court, as a *habeas* court, had power to order release, and that Parhat could seek that remedy immediately, *regardless of whether the government sought another CSRT.* *Id.* at *18.

Eight days earlier, the Supreme Court had decided *Boumediene v. Bush*, 553 U.S.__, 128 S. Ct. 2229 (2008), holding that Guantánamo prisoners "have the constitutional privilege of *habeas corpus*." *Id.* at 2240. Accordingly, the Court of Appeals noted that its disposition in *Parhat v. Gates* "is without prejudice to Parhat's right to seek release immediately through a writ of *habeas corpus* in the district court, pursuant to the Supreme Court's decision in *Boumediene*, slip op. at 65-66." 2008 WL 2576977 at *15.

Release is the relief sought by the Motion.

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[2] At oral argument, the government suggested that the assertions were reliable because they were repeated in multiple reports. Invoking Lewis Carroll, the Court of Appeals observed that "the fact that the government has 'said it thrice' does not make an allegation true." 2008 WL 2576977 at *28 (quoting LEWIS CARROLL, THE HUNTING OF THE SNARK 3 (1876)).

[3] Indeed, the Court of Appeals noted that Parhat had provided "substantial support" for the notions that (i) the source was the communist Chinese government, and (ii) "Chinese reporting on the subject of the Uighurs cannot be regarded as objective." 2008 WL 2576977 at *26.

[4] The Court of Appeals acknowledged the continuing force of this Court's notice order: "The government is under district court order to give 30 days' notice of intent to remove Parhat from Guantánamo." *Parhat*, 2008 WL 2576977, *15 n.19, *18 n.21 (citing *Kiyemba v. Bush*, No. 05-1509, Mem. Order at 2-3 (D.D.C. Sept. 13, 2005)).

FACTUAL HISTORY

A. Parhat's Capture, Imprisonment, And CSRT Proceedings

Parhat's Capture and Imprisonment. Parhat is an ethnic Uighur who fled his home in the far-western Xinjiang Uyghur Autonomous Region, a province of the People's Republic of China (also referred to as "East Turkistan"). *Parhat*, 2008 WL 2576977 at *2. Parhat fled to escape the oppression of the Chinese government. *Id.* In June 2001, he made his way to what the government would characterize (a characterization accepted by the D.C. Circuit) as a "training camp" in Afghanistan. *Id.* As we will see, however, there was no evidence that Parhat, or any group with which he is alleged to have affiliated himself, ever trained to engaged in hostilities against the United States. After the war began, Parhat and seventeen other unarmed Uighurs fled to Pakistan. *Id.* at *3. Local villagers subsequently handed them over to Pakistani officials, who then turned them over to the U.S. military. *Id.* The U.S. transferred Parhat and the other Uighurs to Guantánamo in June 2002. *Id.*

For over two years after he arrived in Guantánamo, Parhat (like the other men imprisoned at Guantánamo) was held without a hearing of any sort. In 2003, a military officer of the Criminal Investigation Task Force ("CITF"), U.S. Department of Defense ("DoD"), who was charged with reviewing Parhat's case, "'recommend[ed] the release of Parhat under a conditional release agreement.'" 2008 WL 2576977 at *3 (quoting CSRT Decision, encl. 2, at 2).

The CSRT Order and Procedures. In July, 2004, the DoD issued an "Order Establishing Combatant Status Review Tribunal" ("CSRT Order"). 2008 WL 2576977, *3. Three weeks later, the Secretary of the Navy issued a memorandum entitled "Implementation of Combatant Status Review Tribunal Procedures for Enemy Combatants detained at Guantánamo Naval Base, Cuba" ("CSRT Procedures"). *Id.* The CSRT Procedures defined an "enemy combatant" as:

> an individual who was part of or supporting the Taliban or al Qaida forces, or associated forces that are engaged in hostilities against the United States or its coalition partners. This includes any person who has committed a belligerent act or has directly supported hostilities in aid of enemy armed forces.

Id. (quoting CSRT Order at 1).

Parhat's CSRT Proceedings. The Tribunal held a hearing for Parhat on December 6,

2004. 2008 WL 2576977, *3 Parhat's own interview and testimony comprised the only evidence concerning the circumstances of Parhat's background and capture. *Id.* He testified that he had gone to Afghanistan solely to join the resistance against China, and stated that he regarded China alone, and not the United States, as his enemy. *Id.* The Tribunal did not find Parhat to be "'an individual who was part of or supporting Taliban or al Qaida forces.'" *Id.* at *3 (quoting CSRT Order at 1), but based its enemy-combatant determination on the theory that Parhat was allegedly affiliated with an alleged organization known as the "East Turkestan Islamic Movement," or "ETIM." The Tribunal acknowledged that "'no source document evidence was introduced to indicate . . . that [Parhat] had actually joined ETIM, or that he himself had personally committed any hostile acts against the United States or its coalition partners.'" *Id.* (quoting CSRT Decision, encl. 2, at 3).

The enemy-combatant finding was pretextual, designed to deflect judicial scrutiny then anticipated after the Supreme Court's recent ruling in *Rasul v. Bush*, 542 U.S. 466 (2004). The Tribunal stated that Parhat "'does present an attractive candidate for release'" and "'urge[d] favorable consideration for release . . . and also urge[d] that he not be forcibly returned to the People's Republic of China' because he 'will almost certainly be treated harshly if he is returned to Chinese custody.'" 2008 WL 2576977, at *4 (quoting CSRT Decision, encl. 2, at 2, 4).

B. Conditions Of Parhat's Confinement

Although military authorities in 2003 and 2004 had concluded that Parhat should be released, the conditions of his confinement became, over time, harsher, until in 2006, he was sent to the "tomb above the ground," as the notorious Camp 6 prison is referred to by the prisoners. Until earlier this month,[5] Parhat had endured an isolation regimen harsher than that of almost any

[5] On July 2, 2008, shortly after the *Kiyemba* petitioners moved for injunctive relief, counsel for Parhat and other Uighurs received confirmation from the government that Parhat, as well as Abdul Sabour (275), Abdul Semet (295), Jalal Jalaldin (285), and Sabir Osman (282), all of whom have *habeas* petitions pending before this Court, were transferred from the isolation regimen of Camp 6 to Camp 4. Between 2003 and 2006, most of the Uighurs had been detained in Camp 4, where they lived communally in a bunk house, ate communally at picnic tables, had 24-hour access to a small outside area (and thus to sunlight and fresh air), and most significantly, had 24-hour access to each other. *See* January 20, 2007 Declaration of Sabin Willett, *Parhat v.*

(Footnote Continued on Next Page.)

federal prison. *See Locked Up Alone – Detention Conditions and Mental Health at Guantánamo*, Human Rights Watch, June 2008, at 20 ("HRW Report"), *available at* http://www.hrw.org/reports/2008/us0608/us0608web.pdf.

In Camp 6, Parhat was isolated in a small, solid-walled cell. Each day he passed 22 hours alone, without natural sunlight or air, without companions, conversation, or activities of any kind. For two hours out of 24, he could be shackled and led to the "rec area," a 3 x 4 meter space surrounded by two-story concrete walls and topped with wire mesh. These two hours afforded his only chance of a glimpse of sunlight. The odds were poor – rec time regularly happened at night, often after midnight. Rec time is also a Camp 6 inmate's only opportunity to speak to another human being. Counsel have observed profound deterioration in the psychological health of the Uighurs since their transfers to Camp 6. They demonstrate anger, listlessness, hopelessness. Some reported hearing voices. *See* January 20, 2007 Declaration of Sabin Willett, *Parhat v. Gates*, No. 06-1397 (D.C. Cir. Jan. 22, 2007), ¶¶ 8-10. *See also* HRW Report at 11.

The Camp 6 isolation regimen appears to cause the same psychological injuries – paranoia, depression, and an inability to distinguish fact from fancy – that American servicemen suffered when isolation was imposed upon them by North Korean captors during the Korean War. After these abuses came to light in 1953 (and were roundly and rightly denounced by the United States), the Department of Defense commissioned studies of the psychological effects of isolation. *See* Lawrence E. Hinkle, Jr. & Harold G. Wolff, COMMUNIST INTERROGATION AND THE INDOCTRINATION OF "ENEMIES OF THE STATES" (1956), *cited in* Stuart Grassian, *Psychiatric Effects if Solitary Confinement*, 22 WASH. U. J. L. & POL'Y. 325 (2006) ("Grassian"). Like Camp 6, Soviet KGB facilities contained cells approximately six by ten feet in size, where the prisoner was isolated for at least 22 hours a day. Grassian at 380-81. The DoD's studies noted the effect of isolation:

(Footnote Continued from Previous Page.)

Gates, No. 06-1397 (D.C. Cir. Jan. 22, 2007), ¶¶ 27-29. *At least six of the Uighur petitioners in these consolidated cases remain in Camp 6.*

> The period of anxiety, hyperactivity, and apparent adjustment to the isolation routine usually continues from one to three weeks. As it continues, the prisoner becomes increasingly dejected and dependent. He gradually gives up all spontaneous activity within his cell and ceases to care about personal appearance and actions. Finally, he sits and stares with a vacant expression, perhaps endlessly twisting a button his coat. He allows himself to become dirty and disheveled. . . . Ultimately he seems to lose many of the restraints of ordinary behavior. He may soil himself. He weeps; he mutters . . . . It usually takes four to six weeks to produce this phenomenon in a newly imprisoned man.

Grassian at 381. The report continued, "[The prisoner's] sleep is disturbed by nightmares . . . . In this state the prisoner may have illusory experiences." *Id.* A psychiatrist who has personally observed more than two hundreds persons held in solitary confinement, Dr. Grassian concludes, "for many of the inmates so housed, incarceration in solitary caused . . . the appearance of an acute mental illness in individuals who had previously been free of any such illness." *Id.* at 333.

Modern studies have concluded that prolonged detention in solitary conditions can cause significant psychiatric harm. The HRW Report noted:

> The absence of social and environmental stimulation has been found to lead to a range of mental health problems, ranging from insomnia and confusion to hallucinations and psychosis . . . even inmates with no prior history of mental illness can become 'significantly ill' when subjected to prolonged periods of isolation.
>
> Predictably, the isolation common in supermax facilities has been found to produce a higher rate of psychiatric and psychological health problems than imprisonment in units where inmates are allowed group recreation, communal meals, and other regular interaction with each other.

HRW Report at 20-21 (citing several recent studies on the effects of solitary confinement on inmates and noting that "[t]his research has been cited by several federal court opinions warning of the negative psychological impact of isolation in prison"). *See also id.* at 49-50 (discussing psychological effects of restricted confinement).

C. The Impact On Parhat Of Further Imprisonment

Parhat is now in his seventh year of imprisonment. In 2007, he appeared to counsel to abandon hope of ever leaving Guantánamo. He requested that a message be passed to his wife that she should consider him dead and remarry. *See* July 21, 2008 Declaration of Sabin Willett ¶ 1. In 2008, his most urgent concern has been to speak to his mother. He understands from the Red Cross that her health is deteriorating. Requests for a telephone call have been

denied. *Id.* ¶¶ 2-3.

ARGUMENT

A. The Court Has A Duty To Give An Effective Remedy.

Remedy is the defining attribute of the judicial branch. It is central to the "judicial power of the United States" vested in the federal courts by Article III of the Constitution. *Muskrat v. United States*, 219 U.S. 346, 356 (1911) ("judicial power . . . is the power of a court to decide and pronounce a judgment and carry it into effect between persons and parties who bring a case before it for decision"). Judicial decrees grant meaningful relief designed to right the wrong in a given case or controversy. *Murray v. Carrier*, 477 U.S. 478, 505 (1986) (correcting a "fundamentally unjust incarceration" is a judicial "imperative"); *Kendall v. United States*, 12 U.S. (Pet.) 524, 624 (1838) (It is "a monstrous absurdity in a well organized government that there should be no remedy, although a clear and undeniable right should be shown to exist."); *Marbury v. Madison*, 5 U.S. (1 Cranch) 137, 163 (1803) (Our government "has been emphatically termed a government of laws, and not of men. It will certainly cease to deserve this high appellation, if the laws furnish no remedy for the violation of a vested legal right."); *see also* 3 W. Blackstone, COMMENTARIES 23 (1783) ("[W]here there is a legal right, there is also a legal remedy, by suit or action at law, whenever that right is invaded.").

Remedy is particularly necessary in cases that present overreaching by one of the coordinate branches of government. *Franklin v. Gwinnett County Pub. Schools*, 503 U.S. 60, 66 (1992) (judicial remedies "historically . . . thought necessary to provide an important safeguard against abuses of legislative and executive power, as well as to ensure an independent judiciary"); *National Treasury Employees Union v. Nixon*, 492 F.2d 587, 604-05 (D.C. Cir. 1974) ("[T]he judicial branch of the Federal government has the constitutional duty of requiring the executive branch to remain within the limits stated by the legislative branch."); *National Automatic Laundry & Cleaning Council v. Shultz*, 443 F.2d 689, 695 (D.C. Cir. 1971) (same).

Nowhere is the imperative for a judicial remedy more urgent than in *habeas*, which presents executive over-reaching at its starkest. "There is no higher duty of a court under our

constitutional system than the careful processing and adjudication of petitions for writs of *habeas corpus*." *Harris v. Nelson*, 394 U.S. 286, 292 (1969); *see Swain v. Pressley*, 430 U.S. 372, 380 n.13 (1977); *Wingo v. Wedding*, 418 U.S. 461, 468 (1974) ("[T]he great constitutional privilege of *habeas corpus* historically provided a prompt and efficacious remedy for whatever society deems to be intolerable restraints. . . . [I]f the imprisonment cannot be shown to conform with the fundamental requirements of law, the individual is entitled to his immediate release."); *Carafas v. LaVallee*, 391 U.S. 234, 238 (1968) (declaring that the right to *habeas corpus* is "shaped to guarantee the most fundamental of all rights"); *Bowen v. Johnston*, 306 U.S. 19, 26 (1939) ("It must never be forgotten that the writ of *habeas corpus* is the precious safeguard of personal liberty and there is no higher duty than to maintain it unimpaired."). This is especially so in a case of "actual innocence." *Schlup v. Delo*, 513 U.S. 298 (1995). The Court exists as a bulwark against indefinite executive imprisonment. Absent remedy, there is no bulwark.

Absent release, there is no *habeas* remedy.[6] Release is the only "meaningful" check on the Executive's unlawful imprisonment.

B. Parhat Is Entitled To Release Into The Continental United States.

1. *Boumediene v. Bush*

On June 12, 2008, the Supreme Court held in *Boumediene* that Parhat has "the constitutional privilege of *habeas corpus*." 128 S. Ct. at 2240. Emphasizing that "the costs of delay can no longer be borne by those who are held in custody," the Court instructed that Parhat and the other Guantánamo prisoners "are entitled to a prompt *habeas corpus* hearing." *Id.* at 2275; *see also id.* at 2263 (recognizing that these are "exceptional circumstances," in part, because of "the fact that these detainees have been denied meaningful access to a judicial forum

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[6] The government appears to concede as much. At oral argument before the Supreme Court in *Boumediene*, the Government said, "if what the Constitution requires to make the DTA to be an adequate substitute is the power to order release, there is no obstacle in the text of the DTA to that. And the All Writs Act is available to allow them [the court] to order release to protect their jurisdiction under the DTA." Transcript of Oral Argument at 37:20-25, *Boumediene v. Bush*, No. 06-1195 (U.S. argued Dec. 5, 2007).

for a period of years").

Judicial power to order release is an essential attribute of *habeas*; the absence of a specific release remedy in the DTA was one reason it was an inadequate substitute for *habeas corpus*. 128 S. Ct. at 2271 ("[W]hen the judicial power to issue *habeas corpus* properly is invoked the judicial officer must have adequate authority to make a determination in light of the relevant law and facts and to formulate and issue appropriate orders for relief, including, if necessary, an order directing the prisoner's release."); *id.* at 2266 ("the *habeas* court must have the power to order the conditional release of an individual unlawfully detained").

2. *Parhat v. Gates*

On June 20, 2008, the D.C. Circuit granted Parhat's motion for judgment as a matter of law. *Parhat v. Gates*, 2008 WL 2576977 at *14-*15.[7] Acknowledging that the extent of the remedy provided by the DTA was in question, the Court explained that "*Boumediene* made it quite clear" that Parhat is entitled to seek *habeas corpus* relief "immediately, without waiting to learn whether the government will convene another CSRT," and that, in such *habeas* proceeding, "he will be able to make use of the determinations we have made today regarding the decision of his CSRT, and he will be able to raise issues that we did not reach." 2008 WL 2576977 at *15 (citing *Boumediene* slip op. at 49, 66). "Most important," the Court emphasized, "in that proceeding there is no question but that the court will have the power to order him released." *Id.* (citing *Boumediene* slip op. at 50, 58). A central tenet of the Supreme Court's decision in *Boumediene* is that the delay in considering the Guantánamo detainees' *habeas* petitions challenging their detention has already been far too long, and that "[t]he detainees in these cases are entitled to a prompt *habeas corpus* hearing." 128 S. Ct. at 2275.

3. "Release," in this case, can only mean release into the United States.

The explicit references to release in last month's Supreme Court and D.C. Circuit

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[7] The opinion was sealed and on June 30, 2008, a redacted version of the opinion was publicly released.

decisions mean, in an appropriate case, release into the United States. This is such a case.

In *Parhat*, the D.C. Circuit ordered the government "to release or to transfer the petitioner, or to expeditiously hold a new CSRT consistent with this opinion." 2008 WL 2576977 at *18. Because "release," in that order, necessarily means something other than "transfer," it means something other than disposition to a foreign government. By process of elimination, "release" can only mean disposition to Parhat's home country or to the United States. But the Court knew and noted that Parhat's home country was unavailable. *Id.* at *15 n.19. The government has always conceded that it is barred from releasing Parhat (or any of the Uighurs) to China, as he would there face an unacceptable risk of torture, or worse, in light of his philosophical antipathy to the communist regime. *See* Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment and Punishment, The International Covenant on Civil and Political Rights, Dec. 19, 1966, S. Exec. No. Doc. E, 95-2, 999 U.N.T.S. 171; *see also Parhat*, 2008 WL 2576977 at *4.[8] Thus, in *Parhat*, the only thing left of "release" was "release into the United States." The Circuit knew this. It can have meant nothing else. And it made clear that in *habeas*, this Court had "the power to order [Parhat] released." *Id.* at *15.

C. The Government Can Offer No Legal Or Equitable Basis To Resist A Release Order.

Based on the experience in previous a Uighur case, Parhat expects that the government may advance several arguments: (i) that it has some sort of inherent Article II power to continue imprisonment indefinitely, regardless of judicial orders; (ii) that it hopes, after seven years,

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[8] The Uighur people have been severely oppressed by the Chinese government. The United States has long condemned China's record of human rights abuses generally, and its oppression of the Uighurs in particular. According to the State Department, in China during 2004 "[f]ormer detainees reported credibly that officials used electric shocks, prolonged periods of solitary confinement, incommunicado detention, beatings, shackles, and other forms of abuse..... Deaths in custody due to police use of torture to coerce confessions from criminal suspects continued to occur." U.S. Dep't of State, Country Reports on Human Rights Practices – 2004 – China, § 1(c) (2005), *available at* http://www.state.gov/g/drl/rls/hrrpt/2004/41640.htm. *See also, e.g.*, Amnesty International, China Report 2005 (China "continues to brutally suppress any peaceful political, religious, and cultural activities of Uighurs, and enforce a birth control policy that compels minority Uighur women to undergo forced abortions and sterilizations."), *available at* http://web.amnesty.org/report2005/chn-summary-eng.

including two years of strenuous advocacy that the appropriate record is the one upon which the case is decided, to pull together a new and improved record; (iii) that it cannot be ordered to "bring" Parhat to the continental United States because that would represent an intrusion on the President's control over immigration matters, as Judge Robertson held in *Qassim v. Bush*, 407 F. Supp. 2d 198 (D.D.C. 2005); and (iv) that release to the United States should not be ordered as a prudential matter. None of these arguments has merit.

1. The Executive has no residual Article II authority to continue Parhat's imprisonment.

The government has elsewhere argued that the Executive has a general Article II power to detain Parhat. This is contrary to the plain text of the Constitution, which confers on the President only the power of the chief general and admiral, carrying out the war that Congress decreed. U.S. Const. art. II, § 2. Nor can the argument withstand the Supreme Court's recent Guantánamo decisions, which flatly reject the President's claim of immunity from congressional or judicial oversight. *See, e.g.*, *Boumediene*, 128 S. Ct. at 2259; *Hamdan v. Rumsfeld*, 126 S. Ct. 2749, 2773 (2006). Nor can such a claim be squared with *Parhat*, whose "release, transfer or expeditiously re-CSRT" order left no room for an untethered "Article II" power.

As *Boumediene* teaches, separation-of-powers concerns cut precisely the opposite way: "Within the Constitution's separation-of-powers structure, few exercises of judicial power are as legitimate or as necessary as the responsibility to hear challenges to the authority of the Executive to imprison a person." 128 S. Ct. at 2277. The Court noted that limitations on *habeas* raised "troubling separation-of-powers concerns," *id.* at 2258, and emphasized that "[b]ecause the Constitution's separation-of-powers structure, like the substantive guarantees of the Fifth and Fourteenth Amendments, protects persons as well as citizens, foreign nationals who have the privilege of litigating in our courts can seek to enforce separation-of-powers principles," *id.* at 2246 (citations omitted); *see id.* at 2259 ("To hold the political branches have the power to switch the Constitution on or off at will . . . would permit a striking anomaly in our tripartite system of government, leading to a regime in which Congress and the President, not this Court, say 'what the law is.'") (quoting *Marbury v. Madison*, 5 U.S. (1 Cranch) at 177). "The test for

determining the scope of th[ese] provision[s] must not be subject to manipulation by those whose power [they are] designed to restrain." *Boumediene*, 128 S. Ct. at 2259.

When the Executive has acted illegally – *i.e.*, beyond the scope of its constitutional powers, as has been adjudicated to be the case here – it is the constitutional duty of the judiciary to order the Executive to stop and the duty of the Executive to obey the judicial order. *See United States v. Nixon*, 418 U.S. 683, 703-05 (1974). Here, as in *Hamdi v. Rumsfeld*, 542 U.S. 507 (2004), the force of the government's argument for a generalized Article II power would be to obtain the forbidden "blank check" that "serves only to *condense* power into a single branch of government." 542 U.S. at 536. This Court can reject that claim, as *Hamdi* held it must, only by giving a remedy. *Id.* at 525 (asserting that the writ of *habeas corpus* "has remained a critical check on the Executive, ensuring that it does not detain individuals except in accordance with law"). In *Boumediene*, the Court reaffirmed that *habeas corpus* is an "an indispensable mechanism for monitoring the separation of powers." 128 S. Ct. at 2259. But there are no protections at all without the remedy of release.

2. The government cannot justify further delay on the basis of a potential "do-over."

Although a month has passed since the D.C. Circuit's decision, so far as counsel is aware, the government has not sought expeditiously to conduct a new CSRT. It would be academic even if the government had done so. Not only did the Court specifically direct that *habeas corpus* relief could be granted notwithstanding new CSRT proceedings, *see Parhat*, 2008 WL 2576977 at *14-*15, but in this particular case no re-CSRT could possibly result in "enemy combatant" status. That is because this case is surpassingly pretextual. The military long ago determined that the Uighurs are not the enemy,[9] and the massive litigation effort that has ensued

[9] Publicly available information confirms that the U.S. determined long ago that Parhat and the other Uighurs are not a threat. In May 2004, for example, State Department spokesman Richard Boucher reiterated that the U.S. had no interest in continuing to detain the Uighurs. U.S. State Dep't Daily Press Briefing (May 13, 2004), *available at* http://www.state.gov/r/pa/prs/dpb/2004/32455.htm. In early November, 2004, military officials told the New York Times that "at least half of the Uighurs here are eligible for release." Neil A. Lewis, *Freedom for Chinese Hinges on Finding a New Homeland*, N.Y. TIMES, Nov. 8, 2004, at

(Footnote Continued on Next Page.)

since then has been politically motivated cover of the most cynical kind. The Department of Defense in 2005 observed that the Uighurs "were all considered the same." *See* Petition for Original Writ of *Habeas Corpus*, *In re Ali*, No. 06-1194, at 8 (U.S. filed Feb. 13, 2007) (quoting Declaration of Deputy Assistant Secretary of Defense for Detainee Affairs Matthew Waxman). Five of Parhat's companions – persons whose situation was precisely identical to his own – were determined by the military to be noncombatants, *id.* at 7, and as the Circuit noted, the account of one of those was contained in Parhat's CSRT record, *see* 2008 WL 2576977, *10.

As a preliminary matter, it would be remarkable, and profoundly inequitable, if the government now sought to build a different record in this case. In 2007 and 2008, it fought three rounds in the D.C. Circuit to establish that the record that Court ultimately considered *in this case* was the *only* record that should be considered. The government lost, *see Bismullah v. Gates*, 501 F.3d 178, 180 (D.C. Cir. 2007); it moved to reconsider and lost, *see Bismullah v.*

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A17. *See also* Tim Golden, *For Guantánamo Review Boards, Limits Abound*, N.Y. TIMES, Dec. 31, 2006, at A20 (quoting a national security official who worked on the Uighur cases, "[W]e were shocked that they even sent those guys before the C.S.R.T.s. They had already been identified for release."); Demitri Sevastopulo, *Uighurs face return from Guantánamo*, FINANCIAL TIMES, Mar. 16, 2005 ("The Pentagon determined last year that half of the two dozen Uighur Chinese captured in the war on terrorism have no intelligence value and should be released. The U.S. has so far resisted Beijing's demands for repatriation out of concern that they may be tortured once back in China."); Navy Secretary Gordon England, U.S. Dep't of Defense News Transcript – Defense Department Special Briefing on Combatant Status Review Tribunals at 3 (Mar. 29, 2005) ("I think it has been reported we have Uighurs from China that we have not returned to China, even though, you know, some of those have been deemed, even before these [CSRT] hearings, to be non-enemy combatants because of concerns and issues about returning them to their country."), *available at* http://www.defenselink.mil/transcripts/2005/tr20050329-2382.html; Editorial, *Detention Dilemma*, WASH. POST, May 3, 2005 ("[T]he military has determined that about 15 of [the Uighurs at Guantánamo] are not 'enemy combatants.' . . . . The Pentagon has, consequently, cleared them for release. The trouble is that the State Department has been unable to find other countries willing to take them."); Carol Rosenberg, *Closing Terror Prison Tricky for U.S.*, MIAMI HERALD, June 12, 2005, at 1A ("Navy Secretary Gordon England confirmed in March that Guantánamo captives include Chinese Muslims – reportedly about two dozen – who are no longer classified as 'enemy combatants,' the Bush administration term for terrorism suspects."); Demetri Sevastopulo, *Cheney Backs Guantánamo Prison Amid Growing Unease*, FINANCIAL TIMES, June 13, 2005, at 6 ("The U.S. is holding about 550 detainees at Guantánamo, including about a dozen Uighur Chinese whom the U.S. has determined are no longer 'enemy combatants.' The U.S. does not want to repatriate the Uighurs ethnic Muslims from China's Xinjiang province out of fear that they could be tortured in China. But the Bush administration is having trouble persuading other countries to take the Uighurs.").

Gates, 503 F.3d 137 (D.C. Cir. 2007); it moved for *en banc* consideration and lost, *see Bismullah v. Gates*, 503 F.3d 137 (D.C. Cir. 2007), and it petitioned the Supreme Court for a writ of *certiorari*, *see Gates v. Bismullah*, No. 07-1054.[10] At every step of the way, it asserted that the record the D.C. Circuit considered *was* the record. It cannot be heard now to say, "Let's have a new record after all." Nor can the government now commence a process to *build* a record to justify an imprisonment that already has almost doubled the entire length of the United States' involvement in World War II. *Habeas corpus* demands an immediate accounting of an existing legal basis for detention: it does not confer on the jailer an invitation to begin justifying his actions after the fact. *See* 28 U.S.C. § 2243 (cl. 2) (writ to be returned within twenty days); *Yong v. INS*, 208 F.3d 1116, 1120 (9th Cir. 2000) (*habeas corpus* is intended to be a "swift and imperative remedy in all cases of illegal restraint or confinement"). In every conceivable way, the government has been on notice of Parhat's contentions since 2005. It cannot now ask for more time to develop a theory.

There is a more fundamental reason that the government is unable to change the outcome of the merits determination. Parhat was not detained as an al Qaida or Taliban fighter or supporter. The pretextual theory advanced in, and rejected by the D.C. Circuit was that he was a member of the "East Turkestan Islamic Movement," and that "ETIM" was part of or supporting al Qaida and had engaged in hostilities against the coalition. *Parhat*, 2008 WL 2576977 at *9-*11. After careful review, the D.C. Circuit found that the record did not support either that ETIM was part of or supporting al Qaida or the Taliban, or that ETIM had engaged in hostilities against the coalition. *Id.* The Court did not reach the question whether Parhat himself was part of ETIM, although it noted the CSRT panel's observation that there was no evidence he had ever joined. *Id.* at *11.

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[10] The Supreme Court took no action in *Gates v. Bismullah*, No. 07-1054, until June 23, 2008, when it issued a "GVR" order granting the government's petition for a writ of *certiorari*, vacating the judgment, and remanding the case to the D.C. Circuit for "further consideration in light of *Boumediene v. Bush*, 553 U.S. __ (2008)."

Thus the decision in *Parhat v. Gates* rests on the question of who our enemy was; specifically, whether ETIM was the enemy seven years ago, during the Afghanistan war. It was always farcical for the government to contend that it needs secret evidence to prove who the enemy is. "Who the enemy is" is for Congress, not the President to say, *see* U.S. CONST. art. I, § 8, cl.10 (power to declare war vested in Congress), and Congress says so in the Congressional Record, not in secret evidence. And whether farcical or not, that question has now left any realm of legitimate judicial controversy and entered history. In 2008, the government is not going to discover new evidence as to whom it was at war with in 2001. It is not going to learn that it was at war with ETIM. It can never discover evidence that Congress authorized any such war, because in the Authorization to Use Military Force, 115 Stat. 224 (Sept. 18, 2001), Congress did not authorize war against ETIM. It authorized only a conflict against those involved in the September 11, 2001 attacks, and those nations and organizations that harbored the attackers. The government has never asserted that ETIM did either. In sum, in this Court, the government will never succeed in making a new case on the merits.

Of course, any effort to reconsider the factual merits of Parhat's status is an effort for which, in *habeas*, Parhat has an absolute right to be present, and against which he may testify. 28 U.S.C. § 2243 (cl. 5) *requires* the custodian "to produce at the hearing the body of the person detained." As then-Judge Stevens explained, "Both parties – not just one – should be afforded an opportunity to argue the relevant facts to the district court. Only after that has been done will it be possible to determine whether an evidentiary hearing is necessary." *Kendzierski v. Brantley*, 447 U.S. 806, 808 (7th Cir. 1971); *see Stewart v. Overholser*, 186 F.2d 339, 342 (D.C. Cir. 1950) ("When a factual issue is at the core of a detention challenged by an application for the writ it ordinarily must be resolved by the hearing process.").

3. No immigration power bars release.

In *Qassim v. Bush*, this Court considered the case of two of Parhat's companions. Judge Robertson ruled their imprisonment was unlawful, but dismissed the case because he concluded the court could not order the men released into the continental United States. 407 F. Supp. 2d at

202-03. We submitted at the time that the order was error, but the appeal to the Circuit was mooted at the eleventh hour by the transfer of the men to Albania (one business day before oral argument). Thus our disagreement with Judge Robertson's order was not tested.

a. *Qassim* has been mooted.

However, Judge Robertson's ruling has since been mooted, and effectively overruled. As shown above, *Boumediene* holds that Parhat has substantive *habeas* rights, and *Parhat* makes explicit that *habeas* gives the Court power to order release into the United States.

b. There was and is no impediment to release into the United States in any event.

Judge Robertson posited in *Qassim* that the court could not order the Executive to "bring" the petitioners to the United States, because doing so would interfere with immigration powers that are the exclusive province of the Executive. We submit this analysis was incorrect, because (i) for remedy purposes, Parhat is already here, and (ii) as a matter of law, detained deportable aliens must presumptively be released into American society after six months.

i. In law, Parhat is already here.

Boumediene vacated section 7 of the MCA, which had stripped from Parhat the right to *habeas corpus* under 28 U.S.C. § 2241, thereby restoring those rights to him. Those rights include, *inter alia*, the requirement that "[u]nless the application for the writ and the return present only issues of law the person to whom the writ is directed shall be required to produce at the hearing the body of the person detained." 28 U.S.C. § 2243 (cl. 5). This statutory injunction applies to all persons who may invoke *habeas*, and that includes, of course, non-citizens, and persons outside the territorial boundaries of a judicial district. *Boumediene*, 128 S. Ct. at 2261.[11]

[11] In *Braden v. 30th Judicial Circuit Court*, 410 U.S. 484 (1973), the Supreme Court rejected earlier reliance on the physical location of the petitioner, and ruled that a Kentucky federal court had jurisdiction in *habeas* over a petition brought by a prisoner in Alabama, even though the necessary import of the decision was that the petitioner might have to be transported to Kentucky. The Supreme Court has made no distinction between citizen and alien as to this proposition. For while it involved a U.S. citizen, *Braden* felt it necessary to overrule *Ahrens v. Clark*, 335 U.S. 188 (1948), a case involving aliens, and *Rasul*, though itself an alien case, relied on *Braden*. "In England prior to 1789, in the Colonies, and in this Nation during the formative years of our Government the writ of *habeas corpus* was available to nonenemy aliens as well as

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The statutory requirement that the body be produced is mandatory, for Parhat's petition does not present "only issues of law." Parhat asserts that, as a matter of *fact*, he is a person whose release into the United States is merited and will create no threat of harm to any person. The Uighurs, he testified, "have never been against the United States and we do not want to be against the United States." *Parhat v. Gates*, 2008 WL 2576977 at *8. (And of course he would respond factually to any further government effort to brand him as an enemy combatant). Thus Parhat has an absolute right – conferred not by the Court but by Congress – to be present in this Court. His physical presence is procured not by an exercise of judicial power, but through Congress's mandate that he be afforded physical presence, in light of the Executive's unilateral action of having transported Parhat, against his will, to a place within the Court's jurisdiction. By enforcing section 2243, the Court will not be "bringing" Parhat anywhere. In law he is already here.[12]

While physical presence for a *habeas corpus* hearing may be the exception, not the rule, that is because the vast majority of *habeas* cases are post-conviction relief cases, which present only questions of law. Here Parhat does assert the right of presence, as Congress authorized him to do. That eliminates any question of the Court intruding on the powers of the coordinate branches. In short, when the Supreme Court concluded that this Court had jurisdiction over the Guantánamo *habeas* cases, and that the petitioners were in a "place that belongs to the United States," its ruling did not mean that Parhat was to be "brought" to the United States. It meant he was already here. Thus there is ample statutory and case authority for the first step: ordering the

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to citizens." *INS v. St. Cyr*, 533 U.S. 289, 301-02 (2001); *see also Ledesma-Valdez v. Sava*, 604 F. Supp. 675 (S.D.N.Y. 1985) (fact that aliens were in aircraft out of New York air space did not deprive court of *habeas* jurisdiction).

[12] In *Rasul*, the majority concluded that Guantánamo petitioners are within the "territorial jurisdiction" of the United States. 542 U.S. at 480. Justice Kennedy agreed. "From a practical perspective, the indefinite lease of Guantánamo Bay has produced a place that belongs to the United States, extending the 'implied protection' of the United States to it." *Id.* at 487. This proposition was reaffirmed in *Boumediene*: "In every practical sense, Guantánamo is not abroad; it is within the constant jurisdiction of the United States." 128 S. Ct. at 2261 (citations omitted).

jailer to produce the body in the court house.

ii. As a matter of law, detained deportable aliens must presumptively be released into American society after six months.

Once Parhat is physically present, the Court may simply order that he be released. At that point he would walk out of the courthouse door.[13] In ordering such relief, the Court would not be granting Parhat asylum, or conferring on him immigration rights. Release into the United States is a remedy specifically available, even to a person who has not technically made an "entry" into the United States. In *Lee Fong Fook v. Wixon*, 170 F.2d 245 (9th Cir. 1948), a *habeas* petitioner was denied admission at the Port of San Francisco as an alien. He claimed to be a citizen. While the dispute was pending – at a time when he had been deemed an alien by the authority with jurisdiction over the question – the petitioner was released on bail (*i.e.*, into California) "to enable him more effectively to pursue his administrative remedy [by gathering evidence of his birth in the U.S.]" 170 F.2d at 246. The Ninth Circuit specifically approved the parole into the continental United States of a *habeas* petitioner at a time when he had made no "entry" and had been found by the relevant authority to be an unlawful alien.

In *Clark v. Martinez*, 543 U.S. 371 (2005), the Supreme Court confirmed a similar principle and approved release into the population of aliens who were physically present but had never been admitted to the United States. The case involved Cubans who arrived in the United States as part of the Mariel boatlift. Under the law then effective, such refugees were not lawful aliens, and they were not "admitted," but rather "paroled" into the United States.[14] (Refugees could later adjust their status to that of lawful permanent resident unless they fell within statutory

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[13] We emphasize that this is an unusual case. In most cases, where there is no credible fear of abuse at home, release of the prisoner to his home country would be the natural remedy. Presence in law for purposes of *habeas* would not limit the Court's remedial power to order that remedy, as opposed to release into the United States. Parhat is entitled to release into the United States because no other remedy is available here.

[14] The Attorney General has discretion to "parole" into the territory of the United States an alien who has never been admitted. 8 C.F.R. § 212.5(a) (2004).

exclusions.) The *Martinez* petitioners committed serious crimes in the United States, and were therefore excluded from admission. They were thus unlawful aliens who had never been admitted to the United States. The men were ordered deported, but because Cuba would not accept them, they were detained pursuant to statute. They brought *habeas corpus* petitions, and the Supreme Court ordered that they must be released, even though they had never been lawful resident aliens. 543 U.S. at 386; *see also Zadvydas v. Davis*, 533 U.S. 678, 699-700 (2001) (adjudicated criminal aliens entitled to release).

Under *Martinez* and *Zadvydas*, detained deportable aliens "must presumptively be released into American society after six months." *Jama v. Immigration & Customs Enforcement*, 543 U.S. 335, 347-48 (2005) (recognizing the rule). This rule has been followed in numerous cases ever since. *See, .e.g., Morales-Fernandez v. INS*, 418 F.3d 1116 (10th Cir. 2005) (applying *Martinez* rule and ordering release of inadmissible Cuban alien held beyond six-month presumptive detention period); *Baez v. Bureau of Immigration & Customs Enforcement*, 150 Fed. Appx. 311, 2005 WL 2436835 (5th Cir. 2005) (same); *Perez-Aquillar v. Ashcroft*, 130 Fed. Appx. 432, 2005 WL 1074339 (11th Cir. 2005) (ordering parole and release into the United States under the rule of *Martinez* of inadmissible Cuban national who had repeatedly violated U.S. laws).

Courts applying *Martinez* have ordered release of inadmissible aliens even where the government raised issues concerning the alien's mental stability, risk to the community, and the protection of national security. *See, e.g., Tran v. Mukasey*, 515 F.3d 478, 486 (5th Cir. 2008) ("While this Court is sympathetic to the Government's concern for public safety, we are without power to authorize [petitioner's] continued detention."); *Nadarajah v. Gonzales*, 443 F.3d 1069, 1083-84 (9th Cir. 2006) (granting Sri Lankan national's motion for immediate release from his five-year detention where agency's conclusions that continued detention was in the public interest or that his release posed risk to national security were based on implausible evidence and ignored evidence of detention's deleterious effect on petitioner's health); *Hernandez-Carrera v. Carlson*, 546 F. Supp. 2d 1185, 1190-91 (D. Kan. 2008) (ordering release of Cuban aliens

detained beyond the six-month presumptive detention period, even though it was alleged that they had a harm-threatening mental illness and were likely to engage in violent behavior if released, such that public safety could not reasonably be guaranteed; explaining that "[i]f further detention of aliens with mental illness or threat of violence is required to protect public safety, rather than the supervised release which is currently authorized, Congress has not yet acted to provide such additional protection").

The foreign nationals in *Martinez* each had been convicted of serious crimes in the United States. They bore responsibility for their stateless plight, because they chose to come to the United States voluntarily. Parhat, by contrast, has never even been charged with wrongdoing, was not deemed by the military in 2003 or 2004 to constitute any threat to U.S. interests, has never been hostile to the United States, and was transported involuntarily to Guantánamo by bounty hunters and the United States military. His release would constitute no threat now.

To the extent of any tension between the urgency of judicial remedy, and the Executive's immigration authority, judicial remedy must prevail. Whatever imposition might exist on immigration discretion is one the Executive placed on itself when it transported Parhat to Guantánamo. But without remedy in this *habeas* case, there will be no check on executive lawlessness, and the entire force of *Boumediene* would be lost.

Habeas corpus, in the words of Justice Holmes, "cuts through all forms and goes to the very tissue of the structure. It comes in from the outside, not in subordination to the proceedings, and although every form may have been preserved opens the inquiry whether they have been more than an empty shell." *Frank v. Mangum*, 237 U.S. 309, 346 (1915) (dissenting opinion) (cited in *Boumediene*, 128 S. Ct. at 2270). That form-cutting power compels a remedy, and the only remedy available here is release.

4. Geneva IV obligates the United States to tolerate Parhat's presence in the continental United States.

Because Parhat is not an enemy combatant, his prior capture by the United States military makes him, as a civilian, a protected person under Geneva IV, Articles 4 and 13, whose custody

is subject to 28 U.S.C. § 2241(c)(3) ("custody in violation of the Constitution or laws or treaties of the United States"). By adopting the treaty, the United States has already acknowledged that those in Parhat's position are entitled to release into the continental United States.

The convention contemplates that such persons may be released from confinement while pursuing (and presumably while the government pursues) a final asylum solution, whether that be here or abroad, and that such a the release has no impact on the parties' respective rights in that regard. Geneva IV recognizes:

> [T]he internee's right to choose between return to his residence or repatriation. It also implies that the Detaining Power [*i.e.*, the United States] has the right to refuse the internee permission to reside in its territory. At that point, what will happen if the internee thus refused permission himself opposes his repatriation? It would be contrary to the spirit of the Convention if he could be forcibly repatriated when he feared persecution in his country of origin for his political opinions or his religious beliefs. In such a case he would become a refugee, obliged to seek a new domicile in a country different from the one in which he is living. *While awaiting the result of his efforts to find such a new domicile, the Detaining Power [i.e., the United States] is bound by its humanitarian duty to tolerate his presence in the country on a temporary basis.*

Geneva Convention relative to the Protection of Civilian Persons in Time of War, Aug. 12, 1949, 75 U.N.T.S. 973, art. 135 cmt. (emphasis supplied). Parhat thus has the right to be released into the continental United States so that he can seek refugee status either in the United States or in another country.

5. Prudential concerns cannot defeat Parhat's release right.

The government can make no case that some equitable or prudential reason can impose further delay on Parhat's legal right to be immediately free of further confinement. Parhat has been imprisoned for more than six years. He has never been charged with, or suspected of criminal wrongdoing. He has never been a martial enemy of this Nation. The "training" he received in the assembly and disassembly of firearms is no different from the training millions of Americans receive every day. Had he physically possessed a firearm in Afghanistan, he would have done no more than every homeowner in the District of Columbia has a constitutional right to do. *See District of Columbia v. Heller*, 554 U.S. ___, 128 S. Ct. 2783 (2008). At his *habeas* hearing, Parhat will meet any suggestion or innuendo that his release would threaten any person.

Nor can the President justify further prudential delay so as to effect a consensual transfer. That process had been underway for a long period before, in 2005, the State Department averred that it had made prodigious efforts. *See* National Public Radio, Morning Edition, "Chinese detainees at Guantanamo get hearing" (Aug. 25, 2005) (interview with Pierre-Richard Prosper, U.S. ambassador-at-large for war crimes, in which Prosper stated that between 2003 and August 2005, the United States asked at least 25 countries to take the Uighurs). The government has long since exhausted any right to seek additional time. *See generally Martinez*, 543 U.S. at 386 (six months the presumptive limit on detention pending deportation). The Executive itself has created the very circumstances of which it complains. Resettlement abroad has become all but hopeless, as the Executive long ago persuaded the rest of the world that Guantánamo prisoners are terrorists.[15]

Parhat concedes that the practical considerations presented by the remedy phase of his case are poignant. Penniless, far from family and friends, and understanding little English, he has suffered an almost unimaginable imprisonment. He cannot suddenly pick up a Berlitz English book and join the work force. It will be important that Parhat receive community support. Immigration authorities will have a legitimate interest in knowing of the conditions of his release. All such arrangements can be addressed at Parhat's *habeas* hearing, as a loyal expatriate community of Uighurs is present in the District of Columbia to provide the necessary support. Representatives of this group (who bear deep allegiance to the United States) will be present in Court and able to assure the Court as to the details of release.

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[15] Justice Jackson wrote of Ignatz Mezei, the alien stranded at Ellis Island, "Since we proclaimed him a Samson who might pull down the pillars of our temple [Mezei was a suspected communist], we should not be surprised if peoples less prosperous, less strongly established and less stable feared to take him off our timorous hands." *Shaughnessy v. United States ex rel. Mezei*, 345 U.S. 206, 220 (1953) (Jackson, J., dissenting).

CONCLUSION

For the foregoing reasons, Huzaifa Parhat respectfully requests that his Motion be granted.

Respectfully submitted,

DATED: July 22, 2008

Susan Baker Manning
susan.manning@bingham.com
Catherine R. Murphy
catherine.murphy@bingham.com
BINGHAM McCUTCHEN LLP
2020 K Street, NW
Washington, DC 20006
Telephone: (202) 373-6000
Facsimile: (202) 373-6001

Sabin Willett
sabin.willett@bingham.com
Neil McGaraghan
neil.mcgaraghan@bingham.com
Rheba Rutkowski
rheba.rutkowski@bingham.com
Jason S. Pinney
jason.pinney@bingham.com
BINGHAM McCUTCHEN LLP
One Federal Street
Boston, MA 02110-1726
Telephone: (617) 951-8000
Facsimile: (617) 951-8736

Counsel for Huzaifa Parhat

EXHIBIT B2

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

IN RE: GUANTANAMO BAY DETAINEE LITIGATION	Misc. No. 08-442 (TFH)
JAMAL KIYEMBA, AS NEXT FRIEND OF ABDUSABUR DOE, et al., Petitioners, v. GEORGE W. BUSH, et al., Respondents.	Civil Action No. 05-1509 (RMU)

MEMORANDUM OF POINTS AND AUTHORITIES IN SUPPORT OF HUZAIFA PARHAT'S MOTION FOR IMMEDIATE RELEASE ON PAROLE INTO THE CONTINENTAL UNITED STATES PENDING FINAL JUDGMENT ON HIS *HABEAS* PETITION

Huzaifa Parhat, a civilian unlawfully imprisoned at Guantánamo Bay, has moved for judgment on his *habeas corpus* petition ordering release into the continental United States. Parhat also has moved for immediate release on parole into the continental United States pending entry of final judgment ("Parole Motion"). He submits this memorandum of points and authorities in support of his Parole Motion.

PROCEDURAL HISTORY

The factual and procedural history of Parhat's case are set out in his motion for judgment and memorandum of points and authorities in support thereof. On June 20, 2008, the Court of Appeals for the D.C. Circuit held that the government's record did not justify Parhat's detention as an enemy combatant. *Parhat v. Gates*, No. 06-1397, 2008 WL 2576977, *1 (D.C. Cir. June 20, 2008). The Court ordered the government to release or transfer Parhat, or to expeditiously hold a new Combatant Status Review Tribunal ("CSRT") consistent with its opinion. *Id.* at *14.

The Court of Appeals noted that this Court, as a *habeas* court, has the power to order release, and that Parhat could seek that remedy immediately, *regardless of whether the government sought another CSRT. Id.* at *18.

Parhat has moved for final judgment ordering his release into the continental United States. He expects that the government will vigorously resist that motion. Because Parhat continues to be held in Guantánamo under no legal authority whatsoever, he has also moved for interim relief: namely, parole into the continental United States pending a ruling on the merits of his motion for judgment.

ARGUMENT

A. This Court Has The Power To Order Parhat's Release On Parole.

This Court has inherent power as a *habeas* court to order "parole—that is, release on conditions—pending its final decision on the merits of Parhat's motion for judgment. *Baker v. Sard*, 420 F.2d 1342 (D.C. Cir. 1969). In *Baker*, the D.C. Circuit stated that "[w]hen an action pending in a United States court seek release from what is claimed to be illegal detention, the court's jurisdiction to order release as a final disposition of the action includes an inherent power to grant relief *pendente lite*, to grant bail or release, pending determination of the merits." 420 F.3d at 1343. The power is an incident to—a lesser-included subset of—*habeas* jurisdiction itself, not simply an analog to a bail statute. *See Johnston v. Marsh*, 227 F. 2d 528 (3d Cir. 1955) (court has power to order bail in *habeas* even in absence of bail statute).

This power is fully available to the Court in cases involving aliens. *See Mapp v. Reno*, 241 F.3d 221, 226 (2d Cir. 2001); *Truong Thanh Tam v. INS*, 14 F. Supp. 2d 1184, 1190-92 (E.D. Cal. 1998) (ordering release of an unremovable alien pending resolution of the merits of a *habeas* petition challenging indefinite detention where the detainee had a high probability of success on the merits and could not be deported to home country). In *Mapp*, for example, the Second Circuit held that there was *inherent* power to admit an alien to bail—power derivative not from any bail statute but from the power to grant final relief in a *habeas* case. 241 F.3d at 226. That power may be used where it may implicate a requirement that the government move

the prisoner. *United States v. Mauro*, 436 U.S. 340, 357 (1978) (power to issue writs of *habeas corpus* includes authority to issue such a writ when it is necessary to bring a prisoner into court to testify or for trial or to remove a prisoner in order to prosecute him in the jurisdiction where the offense was committed); *Chick Yow v. United States*, 208 U.S. 8, 13 (1908) (ordering writ of *habeas corpus* for a petitioner denied entry in a case in which citizenship was disputed; prisoner ordered brought before judge for trial); *Whitfield v. Hanges*, 222 F. 745, 756 (8th Cir. 1915) (concluding that "the [*habeas*] court has ample power to admit the alien to bail or to take his own recognizance").

Parole does not constitute an admission into the United States for immigration purposes, *see Kaplan v. Tod*, 267 U.S. 228, 230 (1925), and Parhat does not, by this motion, seek an order changing his immigration status. Rather, interim release on conditions accords with recent Supreme Court guidance in an analogous circumstance—where deportable aliens have no legal right to admission into the United States, but are stranded because no foreign government has agreed to accept them. In *Clark v. Martinez*, 543 U.S. 371 (2005), the Supreme Court approved release into the population of aliens who were physically present but had never been admitted (for immigration purposes) to the United States. The case involved Cubans who arrived in the United States as part of the Mariel boatlift. Under the law then effective, such refugees were not lawful aliens, and they were not "admitted," but rather were "paroled" (in the immigration sense of the word) into the United States.[1] (Refugees could later adjust their status to that of lawful permanent resident unless they fell within statutory exclusions.) The *Martinez* petitioners committed (and served sentences for) serious crimes in the United States, and were therefore excluded from admission. The men were ordered deported, but because Cuba would not accept them, they were detained pursuant to statute. They brought *habeas corpus* petitions. The Supreme Court ordered that they must be released, even though, as the government argues is true

[1] The Attorney General has discretion to "parole" into the territory of the United States an alien who has never been admitted. 8 C.F.R. § 212.5(a) (2004).

of Parhat, they had no legal entitlement to presence in the continental United States. 543 U.S. at 386; *see also Zadvydas v. Davis*, 533 U.S. 678, 699-700 (2001) (adjudicated criminal aliens entitled to release).

Under *Martinez* and *Zadvydas*, detained deportable aliens "must presumptively be released into American society after six months." *Jama v. Immigration & Customs Enforcement*, 543 U.S. 335, 347-48 (2005) (recognizing the rule). This rule has been followed in numerous cases. *See, e.g., Morales-Fernandez v. INS*, 418 F.3d 1116 (10th Cir. 2005) (ordering release of inadmissible Cuban alien held beyond six-month presumptive detention period); *Baez v. Bureau of Immigration & Customs Enforcement*, 150 Fed. Appx. 311, 2005 WL 2436835 (5th Cir. 2005) (same); *Perez-Aquillar v. Ashcroft*, 130 Fed. Appx. 432, , 2005 WL 1074339 (11th Cir. 2005) (ordering parole and release into the United States of inadmissible Cuban national who had repeatedly violated U.S. laws).

B. Parhat Is Highly Likely To Prevail On The Merits.

1. Parhat has prevailed, and there is no showing the government can overcome its previous loss, in the Court of Appeals.

The Court of Appeals has concluded that Parhat is not an enemy combatant, and that is the *status quo* today. Further, as the Circuit explained, "*Boumediene* [*v. Bush*, 553 U.S.__, 128 S. Ct. 2229 (2008)] made it quite clear" that Parhat is entitled to seek *habeas corpus* relief "immediately, without waiting to learn whether the government will convene another CSRT," and that, in such *habeas* proceeding, "he will be able to make use of the determinations we have made today regarding the decision of his CSRT, and he will be able to raise issues that we did not reach." 2008 WL 2576977 at *15 (citing *Boumediene* slip op. at 49, 66). "Most important," the Court emphasized, "in that proceeding there is no question but that the court will have the power to order him released." *Id.* (citing *Boumediene* slip op. at 50, 58). A central tenet of the Supreme Court's decision in *Boumediene* is that the delay in considering the Guantánamo detainees' *habeas* petitions challenging their detention has already been far too long, and that "[t]he detainees in these cases are entitled to a prompt *habeas corpus* hearing." 128 S. Ct. at 2275.

That *status quo* is unlikely to change. In *Parhat v. Gates*, the government had complete control of the record. That record included none of the myriad exculpatory materials that Parhat had gathered from public sources. Parhat was not able to make his own case or respond to the government's case, the government's record enjoyed a statutory presumption of accuracy, and still the record was so empty that the government could not prevail. 2008 WL 2576977 at *14-*15.[2] The government has not shown that it can overcome the non-combatant determination. It cannot, for the simple reason that Huzaifa Parhat has never himself been, nor affiliated himself with this Nation's enemies.

2. Parhat is entitled to the remedy of immediate release.

Like the detainees in *Martinez*, Parhat is detained for the practical reason that no safe country has been found to take him. As discussed in Parhat's memorandum of points and authorities in support of his motion for judgment, the government has conceded that it cannot return him to China, and it is evident that all efforts to persuade allies to accept him as a refugee have failed. Accordingly, Parhat falls within the rule of *Martinez*, and must be released here.

Under the *Martinez* rule, courts must order release of an inadmissible alien even where substantial issues are raised concerning the alien's mental stability, risk to the community, or the protection of national security. *See, e.g., Tran v. Mukasey*, 515 F.3d 478, 486 (5th Cir. 2008) ("While this Court is sympathetic to the Government's concern for public safety, we are without power to authorize [petitioner's] continued detention."); *Nadarajah v. Gonzales*, 443 F.3d 1069, 1083-84 (9th Cir. 2006) (granting Sri Lankan national's motion for immediate release from his five-year detention where agency's conclusions that continued detention was in the public interest or that his release posed risk to national security were based on implausible evidence and ignored evidence of detention's deleterious effect on petitioner's health); *Hernandez-Carrera v. Carlson*, 546 F. Supp. 2d 1185, 1190-91 (D. Kan. 2008) (ordering release of Cuban aliens

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[2] The opinion was sealed and on June 30, 2008, a redacted version of the opinion was publicly released.

detained beyond the six-month presumptive detention period, even though it was alleged that they had a harm-threatening mental illness and were likely to engage in violent behavior if released, such that public safety could not reasonably be guaranteed; explaining that "[i]f further detention of aliens with mental illness or threat of violence is required to protect public safety, rather than the supervised release which is currently authorized, Congress has not yet acted to provide such additional protection").

A fortiori, Parhat is entitled to release, because none of those concerns applies here. As demonstrated in Parhat's memorandum of points and authorities in support of his motion for judgment, he has never even been charged with wrongdoing, and has never engaged in nor contemplated hostilities against the United States or its allies. He has been cleared for release for years. He was not deemed by the military in 2003 or 2004 to constitute any threat to U.S. interests, and was transported involuntarily to Guantánamo by bounty hunters and the United States military. His temporary release would constitute no threat.

Parhat's situation recalls that of Italian prisoners of war during World War II. On September 29, 1943, the Badoglio government executed the instrument of Italian surrender with allied forces. *See* Instrument of Surrender of Italy, Sept. 29, 1943, 61 Stat. 2742, 3 Bevans 775. But in September 1943, the Italian peninsula remained in chaos and repatriation of Italians to Italy was impractical. Thus Italian prisoners of war were granted substantial liberty. More than 45,000 Italian prisoners of war joined "Italian Service Units," located throughout the continental United States. *See* Camilla Calamandrei, *Italian POWs Held in America During WW II: Historical Narrative and Scholarly Analysis* (2000), *available at* www.italianpow.com/history.html. These former enemy combatants were given increased freedom of movement among the civilian population: they held jobs and earned money. *Id.* In San Francisco, California, and Ogden, Utah, for example, Italian-American families could take Italian Service Unit members out of POW camps for picnics and outings. *Id.* Fraternization was common: after the war, a significant number of American women traveled to Italy to marry former Italian prisoners of war. *Id.*

After the Italian armistice, prisoners of war formerly held at Camp McKay in South Boston were transported to a housing facility on Peddocks Island in Boston Harbor, which was "not a stockade," according to the commander. *See generally* July 21, 2008 Declaration of Sabin Willett ("July 21, 2008 Willett Decl.") Ex. 1 (*Moved From So. Boston to Harbor Island; Two Sides of the Row*, Boston Globe, July 30, 1944). The Italians were permitted to work for pay. They received liberty to go among the civilian population of the city. *Id.* The War Department stated that "these service units of Italian prisoners of war are being used in *all major ports of embarkation the country*." *Id.* (emphasis supplied). A brigadier general sent a commendatory telegram to local Italian-Americans in the Boston area who had provided social support for the Italian POWs. The army sent out for ice cream and cookies. *Id.* The Boston Globe reported that young women at Carson's Beach [were] "passing notes through the fence." *Id.*; *see also* July 21, 2008 Willett Decl. Ex. 2 (*Former Italian Prisoners Enjoy Boston Hospitality*, Boston Globe June 5, 1944) (documenting how Italian POWs attended Mass in Boston's North End, picnics, and concerts along the Esplanade).

3. An immediate, practical remedy is available.

An immediate vehicle for release is available. A community of Uighur Americans is resident in the District of Columbia and its environs, and is deeply sympathetic to Mr. Parhat's plight. *See generally* Declarations of Alim Seytoff and Rebiya Kadeer, submitted herewith. This expatriate community has deep loyalty to the United States. Its leader, Ms. Kadeer, has met with and been honored by President Bush for her tireless efforts in behalf of human rights. The community has broad experience helping Uighur refugees, some of them victims of long Chinese imprisonment, negotiate the linguistic and practical challenges of resettlement in the United States. Ms. Kadeer herself, current president of the Uyghur American Association and the World Uyghur Congress, arrived in this country in 2005 after a long and harsh imprisonment in the People's Republic of China. Kadeer Decl. ¶¶ 5, 8.

In addition, U.S. law itself provides a means of maintenance for persons, like Parhat, in the situation of petitioners like those in *Martinez*; for example, through regulations providing for

the issuance of temporary work authorizations for aliens released under an order of supervision. *See* 8 C.F.R. § 241.13(h)(3); 8 C.F.R. § 241.5(c); 8 C.F.R. § 274a.12(c)(18).

The Court can order such conditions of release as are reasonable. For example, the Court may wish to order regular reporting to the U.S. Marshals' Service, the Department of Homeland Security, or to other governmental officials, while Parhat's *habeas* case is pending. The Court may wish also to enter appropriate restrictions on travel. The Uighur American community can provide valuable assistance in assuring that Parhat can understand and comply with whatever conditions of release may be imposed by the Court. All such arrangements can be addressed at Parhat's parole hearing.

The situation of Italian prisoners of war during World War II is particularly instructive. On September 29, 1943, the Badoglio government executed the instrument of Italian surrender with allied forces. *See* Instrument of Surrender of Italy, Sept. 29, 1943, 61 Stat. 2742, 3 Bevans 775. Northern Italy remained under control of the German army, and the Germans had purported to place Benito Mussolini at the head of newly declared fascist "republic." Accordingly, in September 1943, the Italian peninsula remained in chaos and repatriation of Italians to Italy was impractical. The war against Germany would rage on for twenty months.

Nevertheless, Italian prisoners of war were granted substantial liberty. More than 45,000 Italian prisoners of war joined "Italian Service Units," located throughout the continental United States. *See* Camilla Calamandrei, *Italian POWs Held in America During WW II: Historical Narrative and Scholarly Analysis* (2000), *available at* www.italianpow.com/history.html. These former enemy combatants were given increased freedom of movement among the civilian population: they held jobs and earned money. *Id.* In San Francisco, California, and Ogden, Utah, for example, Italian-American families could take Italian Service Unit members out of POW camps for picnics and outings. *Id.* Fraternization was common: after the war, a significant number of American women traveled to Italy to marry former Italian prisoners of war. *Id.*

After the Italian armistice, prisoners of war formerly held at Camp McKay in South Boston were transported to a housing facility on Peddocks Island in Boston Harbor, which was

"not a stockade," according to the commander. *See generally* July 21, 2008 Declaration of Sabin Willett ("July 21, 2008 Willett Decl.") Ex. 1 (*Moved From So. Boston to Harbor Island; Two Sides of the Row*, Boston Globe, July 30, 1944). The Italians were permitted to work for pay. They received liberty to go among the civilian population of the city. *Id.* They would ride a ferry from Peddocks Island, where they were housed, to work at the Boston Port of Embarkation, where they were paid for work. *Id.* This was not unique to Boston: the War Department stated that "these service units of Italian prisoners of war are being used in *all major ports of embarkation the country*." *Id.* (emphasis supplied).

The commander reported that "they will be given some liberty on their days off in the way of passes out of the camp." July 21, 2008 Willett Decl. Ex. 1. A brigadier general sent a commendatory telegram to local Italian-Americans in the Boston area who had provided social support for the Italian POWs. Even before the transfer to Peddocks, security was lax. The army sent out for ice cream and cookies. *Id.* The Boston Globe reported that young women at Carson's Beach [were] "passing notes through the fence." *Id.*

On June 4, 1944, a group of Italian POWs was taken to St. Leonard's Church in Boston's North End,[3] and thence to the Hatch Shell (an outdoor concert facility along the Esplanade most famous for its Fourth-of-July concerts). *See generally* July 21, 2008 Willett Decl. Ex. 2 (*Former Italian Prisoners Enjoy Boston Hospitality*, Boston Globe June 5, 1944). The Boston Globe reported:

> Following the church services, the men were conveyed by troop carriers down Prince St. in the North End. Crowds cheered them as they passed through Boston's closest facsimile to their beloved homeland. At the Hatch Memorial Shell on the Charles River Esplanade, they halted and sang a native song entitled, "A Bouquet of Flowers."

Id. The men posed for pictures; they played bocci; they "feast[ed] on native dishes." *Id.*

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[3] Then as now, the North End of Boston was home to large numbers of Italian-Americans. It appears that the spirit of welcome among Uighur expatriates in the District of Columbia and its environs would be no less heartfelt.

CONCLUSION

For the foregoing reasons, Huzaifa Parhat respectfully requests that his Parole Motion be granted.

Respectfully submitted,

DATED: July 23, 2008

Susan Baker Manning
susan.manning@bingham.com
Catherine R. Murphy
catherine.murphy@bingham.com
BINGHAM McCUTCHEN LLP
2020 K Street, NW
Washington, DC 20006
Telephone: (202) 373-6000
Facsimile: (202) 373-6001

Sabin Willett
sabin.willett@bingham.com
Neil McGaraghan
neil.mcgaraghan@bingham.com
Rheba Rutkowski
rheba.rutkowski@bingham.com
Jason S. Pinney
jason.pinney@bingham.com
BINGHAM McCUTCHEN LLP
One Federal Street
Boston, MA 02110-1726
Telephone: (617) 951-8000
Facsimile: (617) 951-8736

Counsel for Huzaifa Parhat

EXHIBIT C

UNITED STATES DISTRICT COURT

DISTRICT OF COLUMBIA

IN RE: GUANTANAMO BAY DETAINEE LITIGATION

C.A. 05-1509
C.A. 05-1602
C.A. 05-1704
C.A. 05-2398
C.A. 05-2370
C.A. 05-1310

MISC. ACTION NO. 08-0442

WASHINGTON, D.C.

THURSDAY, AUGUST 21, 2008

1:30 P.M.

STATUS HEARING

BEFORE THE HONORABLE RICARDO M. URBINA

UNITED STATES DISTRICT COURT JUDGE

A P P E A R A N C E S:

FOR THE PLAINTIFFS,

ERIC A. TIRSCHWELL, ESQ.
MICHAEL J. STERNHELL, ESQ.
KRAMER LEVIN NAFTALIS & FRANKEL, LLP
1177 Avenue of the Americas
New York, NY 10036
(212) 715-8404

ELIZABETH P. GILSON, ESQ.
ATTORNEY AT LAW
383 Orange St
New Haven, CT 06511
(203) 777-4050

NEIL MCGARAGHAN, ESQ.
BINGHAM MCCUTCHEN, LLP.
150 Federal Street
Boston, MA 02110-1726
(617) 951-8000

FOR THE DEFENDANTS,

JUDRY LAEB SUBAR,ESQ.
ANDREW I. WARDEN,ESQ.
U.S. DEPARTMENT OF JUSTICE
Civil Division
20 Massachusetts Ave.,N.W.
Washingt4on, DC 20530
(202)616-5084

REPORTED BY:

WENDY C. RICARD, RPR, CCR
OFFICIAL COURT REPORTER
333 Constitution Avenue, NW
Room #6718
Washington, DC 20001
(202)354-3111

Proceedings recorded by mechanical stenography.

Transcript produced by computer-aided transcription.

P-R-O-C-E-E-D-I-N-G-S

THE DEPUTY CLERK: Matter before the Court, a Guantanamo Bay detainee litigation; miscellaneous action number 08-0442; civil action numbers 05-1509, 05-1602, 05-1704, 05-2398, 05-2370, 05-1310.

Counsel, please approach the podium and identify yourselves for the record and the reporter.

MR. SUBAR: Judry Subar from the Department of Justice for the government, Your Honor, and with me at counsel table is Andrew Warden also from the Department of Justice. Thank you.

THE COURT: Thank you.

MR. TIRSCHWELL: Good afternoon, Your Honor. Eric Tirschwell from the firm of Kramer Levin. With me is my colleague, Michael Sternhell, and we represent four of the petitioners on the various docket numbers. Shall I list them for the record?

THE COURT: Not necessary at this point.

MR. TIRSCHWELL: Thank you, Judge.

MS. GILSON: Good afternoon, Your Honor. Elizabeth Gilson. I'm a lawyer in New Haven, Connecticut. I represent two of the petitioners, and I wanted to add, pursuant to Your Honor's agreement, Mr. George Clarke is not here with us today, but has agreed to allow us to speak on his behalf. He represents two other prisoners.

THE COURT: Very well. Okay.

MR. MCGARAGHAN: And lastly, Your Honor, good afternoon. Neil McGaraghan on behalf of the petitioners in 1509 and 1602 from the firm of Bingham McCutchen.

THE COURT: Thank you. Are there any preliminary matters; anything that's happened that I need to know about that suggests matters have been resolved?

MR. SUBAR: I don't believe so, Your Honor.

THE COURT: No. All right. What I'm going to do is walk through the issues that I've gathered from your submissions and include those, of course, which are before the Court by way of motion, and then I will give counsel an opportunity to address matters at the end so that counsel can clarify matters or make whatever corrections they may feel are appropriate for the record.

This is a status conference and I did receive your joint status report, and I won't rule on anything without giving you a full opportunity to be heard today, but I want to announce here at the outset that there are certain realities that continue to loom large and larger and larger as each day goes by, not the least of which is that these people, these petitioners, have been detained since November or December at Guantanamo Bay. Several of these people have already been designated as not enemy combattants and that there have been -- there's been quite a bit of time, specifically, these seven

years, and, more specifically, the time that has lapsed since Boumediene was decided, as well as Parhat.

And while we may be able to discuss and refine these matters as the law requires us to do all in the hope of equipping me with the knowledge, information, and authority to act properly under the circumstances. This matter of the detention of these individuals, these petitioners, for such an extended period of time under circumstances which strongly suggest -- well, clearly indicate on the part of some and strongly suggest on the part of others -- that there is no current understanding of wrongdoing on their part presses this Court, both pursuant to the law, specific authority that is inherent, as well as is explicitly discussed in cases relating to the power of the Court under habeas corpus, not the least of which is Boumediene, all of that has left this Court in a very uncomfortable situation.

Since, of course, it is the law that should govern, the parties that come to court are entitled to believe that the law will be followed. That's the way our system works. However, woven into the gaps that exist within the statements of law, the ambiguities that arise when matters are discussed or there is a failure to discuss certain matters, that is, when the Supreme Court and Courts of Appeals have discussed matters and left other matters unresolved, all of this invokes the discretion of the Court to act in a fashion that is in

keeping with the spirit of the law, as well as with the letter of the law.

So I want to put everyone on alert that I have thoroughly acquainted myself with the law, and I have thoroughly acquainted myself with each sides interpretation of the relevant law, and I have, to the best of my knowledge, thoroughly acquainted myself with the interpretations that the parties wish the Court to adopt as a basis for action requested or the deferral of action requested by the respective parties.

But the law and its agents, whether they be from the congressional branch, the executive branch, and the so-called political branches, and the judicial branch, which is not a political branch, all incorporate -- all require that the Court incorporate a certain measure of conscience since it is not from the black letter of the law that justice arises in each instance. The law is a servant of the people, it is not the master of the people, and no branch understands that better than the judicial branch.

So I wanted to set that tone so that we don't get lost in the assertion of technicalities on one side or the other as presumptive instruments to overrule what conscience and common sense otherwise dictate since the judge in this case is not a machine, he's a person, who will try to incorporate all that is relevant in determining a just and

appropriate and conscionable outcome.

Starting with this issue of authorization -- the government is saying that the petitioner should not be permitted to continue, at least certain petitioners, in their capacity as -- represented in their capacity by persons who are next friend, and this case of Whitmore versus Arkansas, a Supreme Court pronouncement of 1990 seems to set out a standard that is clear enough for the Court to follow and apply under the circumstances.

It appears that there are 13 of the petitioners that have provided direct authorizations to proceed with their cases without next friend designation, and the petitioners indicate in the face of the challenge that's brought by the government that the petitioners will file these authorizations on or before September the 28th in compliance with Judge Hogan's order.

Four of these petitioners, specifically, Sabour, Mamet, Mahnut, Razakah -- it is stated here in the submissions have refused to meet with counsel, petitioner's counsel, and, consequently, the counsel for the petitioners are indicating that they will make further and extended efforts to secure direct authorizations from these individuals on or before September the 29th.

The Whitmore case which informs the Court on these matters of when parties' petitioners can proceed with next

friend indicates that next friend is -- that an adequate explanation such as inaccessibility, mental incompetence, or other disability need to be presented as to why the real party in interest cannot appear on his own behalf to prosecute the action. And secondly, this next friend individual must have a significant relationship with the petitioner in order to demonstrate that he is truly dedicated to the petitioner's best interest.

It would appear that the second prong of this test has been satisfied given a number of factors, satisfied as to those who have expressed this willingness to proceed by next of friend given the government's rules precluding the detainees from contacting their families and recognition that friends may in fact be next friends. What I've been able to acquire by way of the submissions and affidavits and declarations and so forth suggests that this prong is more or less satisfied.

However, the first prong is the tougher question before the Court; that is, has there been an adequate explanation, such as inaccessibility, mental incompetence, or disability why the real party in interest cannot appear on his own behalf to prosecute the action. That raises a question of whether the conditions of confinement and the length of detention have been so severe that the detainees are rendered incapable of authorizing their own petitions.

For these reasons and other apparent reasons, the Court will wait until September the 29th to see what occurs with respect to these other individuals with which need to have additional information or who need to supply additional information; that is to see whether counsel's efforts between now and then have yielded the authorization, and, if not, then to see if additional briefing is needed to move ahead on that issue.

On the issue of the enemy combattant status, the government recognizes that five of the petitioners, Parhat, Semet, Jalaldin, Ali, and Osman are no longer enemy combattants, or putting it another way, it's unclear whether they ever were enemy combattants, but, in any event, the government has designated them as no longer enemy combattants by way of the original allegations and that the only remaining issue with respect to them is the issue of remedy.

Accordingly, the government indicates that it will not be filing a factual return on those specific petitioners. My question to the petitioners, the appropriate petitioners through counsel at this point is whether the petitioners would like to join Semet, Jalaldin, Ali, Osman to the pending motions pertaining to Parhat.

MR. MCGARAGHAN: Your Honor, I think that's the right thing to do in light of the admission of the government, yes, and I'm here representing all four of those petitioners.

MR. SUBAR: Yes. Your Honor, the question at this point is whether --

THE COURT: To have those motions apply to these four.

MR. SUBAR: Yes, that's fine. And just to clarify one thing, for purposes of the proceedings before Your Honor, I really don't think that this matters, but, as a formal matter, the five individuals were designated through the Defense Department's formal mechanisms as enemy combattants. Because there hasn't been another round of CSRT proceedings, they haven't been technically designated as no longer enemy combattants, but they're being treated as such. Again, for purposes of the proceedings before Your Honor, I don't think that makes any difference, but I just wanted to clarify.

THE COURT: There are eight other petitioners who more or less remain in a state of what's been described as executive limbo. Despite two court orders requesting that the government indicate whether factual returns will be necessary for each of these petitioners, the government has said little more than that it is in the process of completing a comprehensive review of detainees' information to determine in light of Parhat versus Gates whether the government should be -- whether the petitioner should be treated in the same way as the other five petitioners.

If I understand the government's position correctly,

Mr. Subar, you will have that -- the government will have that information available by September the 30th.

MR. SUBAR: That is the plan, Your Honor, yes.

THE COURT: Okay.

MR. SUBAR: Thank you.

THE COURT: On the issue of efforts to resettle -- to the best of my knowledge, there is no date for resettling these people, and this is not to speak lightly of the difficulty that the government is encountering in trying to find -- well, in trying to make suitable arrangements for the resettlement of these individuals.

In the redacted portion of the Pierre Prosper's declaration, he indicates that the Department of Defense is constantly reviewing -- this is a quote -- the continued detention of each individual held at Guantanamo Bay Naval Base, Cuba.

This concept of constantly reviewing seems to some extent be inconsistent with the government's inability to inform the Court whether the remaining Uighurs are enemy combattants or not. That kind of attention paid over such an extended period of time, that kind of constant review given to this matter over such an extended period of time, belies an inability of the government to declare whether or not these individuals are enemy combattants, and that situation has to change.

Regarding motions -- Judge Hogan has ripe motions regarding certain matters, the burden to be borne by the respective parties, the scope of the discovery, the standard for obtaining evidentiary hearing, the application of confrontation and compulsory process rights, and the standard governing hearsay evidence.

This Court has certain ripe motions as well, including a motion for the Court to adjudicate Mr. Parhat's petition and to order his release to the United States and for the Court to order Mr. Parhat's release pending resolution of his petition. The parties have addressed matters, and, by the way, the submissions were very good. Thank you. They provided certainly the quality of information that provides a greater comfort level in being able to look at these issues realistically and comprehensively. I appreciate that.

As to the merits on the motion, petitioners are saying that release in this case is the only means to satisfy the situation as it currently stands, and, specifically, that release into the United States is what is called for here. The petitioners claim citing Boumediene and other authority that the executive doesn't have any residual Article II authority to continue Parhat's detention, and he quotes -- the petitioners quote Boumediene to say, quote: To hold a political branches have the power to switch the Constitution on or off at will would permit a striking anomaly in our

tripartite system of government leading to a regime in which Congress and the President, not the Court, says what the law is.

Well, as we all know, what the law is is really the function of the Court to interpret the law. It's the function of the Court to enforce the law. It's the function of the executive branch to write the law and it's the function of the legislative branch. So the best the parties can do is to present the Court with the law and lend to that their respective interpretations.

Petitioners go on to say that -- citing the Supreme Court in Boumediene -- determining the scope of these provisions must not be subject to manipulation by those whose power they are designed to restrain. That's powerful language, very powerful language. The petitioners go on to talk about executive war time powers and so forth, but I'll talk more about that in a bit.

Petitioners urge that releasing them into the U.S. presents no immigration concerns because, for remedial purposes, Parhat is already in the United States as a matter of law, and detained deportable aliens must be presumptively be released into American society after six months to cite the law.

Petitioners cite the Geneva Convention which the government quickly points out the citation is actually to the

Red Cross statement interpreting the Geneva Convention provision, but the Geneva Convention, according to the petitioners, obliges the United States to release civilians into the continental United States while pursuing a final asylum solution, and isn't that what we have here, a request for release pending a final asylum solution. These individuals cannot be sent back to China.

And lastly, the petitioners say that the government cannot benefit from a delay due to circumstances that the government itself has created. The petitioners, specifically, Parhat, cites the Court to its inherent power; citing Baker versus Sard; cites the cases of Trong Thanh Tam(ph); that's Trong Thanh; T-H-A-N-H; Tam versus INS, a federal district court case; Clark versus Martinez, and other historical situations; for example, the Italian POW's who were not able to be repatriated to Italy due to the German occupation were released into the United States during World War II.

And the petitioners specifically identify an option -- specifically reenforce the option of release into the United States pending final resolution by indicating that there is a community of Uighurs, according to petitioners, that according to them that are ready, willing, and able to house and take care of the Uighur detainees pending final resolution here in the United States. I think locally. And that a matrix of conditions could be created that would insure

that Uighurs -- Parhat, specifically -- but Uighurs, generally, could be placed in the community minimizing any danger and creating the type of monitoring and supervision that would be similar to what happens when persons are accused of murder or accused of any other serious crime and are for reasons explained by the law released into the community pending the outcome of the case.

There's been some substantial reliance by the government placed on the Qassim case decided by my esteemed and colleague, Judge Robertson, and, certainly, there is some rather strong language in that case which speaks against some of the propositions that were advanced by the petitioners. That Qassim case, which I believe was decided in December of 2005, is quoted as saying quote: A strong and consistent current runs throughout the cases that respects and defers to the special province of the political branches, particularly the executive, with regard to the admission or removal of aliens.

Judge Robertson is quoted further that release of individuals, petitioners, at least the petitioner in that case at that time, would have national security and diplomatic implications beyond the competence or the authority of the court, but, of course, we have Bomediene and Parhat that have been decided since then.

The government hastens to point out, however, that

even in Boumediene, one can find language out of Qassim that supports the government's position. When stated, quote: The habeas court must have the power to order the conditional release of individuals unlawfully detained, though, release need not be the exclusive remedy and is not the appropriate one in every case in which the writ is granted.

I believe the government is citing that proposition in connection perhaps with a case where the Court was called upon to exercise its habeas power and an alternative to release developed quickly which was a decision to retry the individual under scrutiny and to retry him quickly in lieu of release.

So the Qassim case is distinguished in a number of ways I think which are obvious; the timing of that decision relative to what's transpired since then. Certainly, the Court knows it -- the courts know what authority they have now thanks to Boumediene and thanks to Parhat and so I believe the Qassim case, which is helpful does not necessarily undermine the position taken by the petitioners on the point of release; certainly release on parole pending a final outcome.

The government continues to say that it has executive power to windup Parhat's detention in an orderly fashion. I do not disagree with the notion of winding up matters in an orderly fashion. But there's been quite a bit of time dedicated to this process of determining what is

needed in order to wind things up and clearly I understand at this point that the government's options as far as placement and resettlement have been adversely affected.

Sill, there is this notion of moving an individual who's been incarcerated for seven years and is now designated by the government as not a criminal combattant or at least acknowledged by the government to be not a criminal combattant. The options being to keep him detained or to release him pending the final resolution, and the final resolution of this case will be resettlement. The government has already opted not to retry Mr. Parhat.

The government emphasizes that the Court cannot order Mr. Parhat's parole, and it cites that that's the authority of the Homeland Security who's discretion to parole Parhat into the United States can't realistically be questioned. What I do know is that the Secretary of Homeland Security hasn't acted on this, at least I know from what has been presented, and that Mr. Parhat is still where he's been for seven years.

, there is something interesting I find about the government's body of support, at least one piece of it, and that is the government implies or perhaps states more explicitly than by implication that because Mr. Parhat has associated himself in the past with the ETIM and having received weapons training in a Taliban-sponsored ETIM camp,

Mr. Parhat is specifically inadmissible to parole custody in the United States because of his connection with terrorist organizations.

I gather that that is cited as a fact that under law would prevent Mr. Parhat's release into the United States. The petitioner responds essentially by saying, well, if that's -- if that is a reason that he has been associated with terrorist organizations, that has not been proven. Certainly, his current status as designated presently by the government belies that, but, in any event, I gather from what the defense is saying, well, if that's a major piece of what the government is relying on then we should have a hearing with Mr. Parhat present so that the Court can look in his eye, listen to his testimony, and make a determination of whether or not that reason is a valid reason; watch direct examination and cross-examination as I've done for the last 27-and-a-half years and make a decision as to whether or not this is a truth-telling person or not.

That's the sense I get from what the petitioner is saying. Maybe that is an option. I'll hear what the government has to say about what that ETIM association really means in the scheme of things when it comes down to why Mr. Parhat cannot be released into the United States pending a final outcome.

Petitioners point out or at least assert that by

detaining Mr. Parhat indefinitely the petitioners feel that the government is directly in contravention to the Circuit's order directing it, the government, to transfer, release, or conduct a new CSRT hearing. The government has already said it's not going to pursue another CSRT.

So the decision has come down -- there's been a mandate, there's been a clear statement -- at least as to what the government's options are. The government has taken one of those options off the table; the others are transfer or release. Transfer I understand in the sense of resettlement is not as easy as it sounds, but release pending a resolution of these many complicated issues that the government is contending with before being able to resettle Mr. Parhat, I don't understand why that is not a viable option.

The petitioners remind the Court that they are not seeking or at least Parhat is not seeking parole relief pursuant to statutory authority given the Secretary of Homeland Security. What Mr. Parhat is looking for is parole pursuant to habeas authority. Fundamental equitable powers of a habeas court to order a petitioner's release on parole or bail pending a determination on the merits of his claim. They go on to say that this power does not depend on an alien status, but on the Court's inherent authority in habeas cases, and they cite Clark versus Martinez; Supreme Court case at 543 US 371 or 387.

There are a couple of issues that I'll call miscellaneous issues. I'll address them now so that both or either side will have a brief opportunity to clarify or to take a position. The petitioners are requesting that the Court require the government to promptly advise the Court and petitioners' counsel first when it plans to provide more intellectual stimulation for the detainees in Camp VI. Secondly, that the government be required to provide 48 hours notice before transferring a petitioner to a different camp.

The petitioners also are requesting that the Court enter an order clarifying Judge Hogan's order of July the 10th determining whether that order applies to petitioners' Abdul Ghappar and Adel Noori -- Adel, that's A-D-E-L; N-O-O-R-I. This order referenced requires the government to provide the Court and petitioners with 30 days' advance notice of any intended removal of the petitioners from Guantanamo.

I'm not prepared at this moment to order the government to provide more intellectual stimulation as it's phrased, but certainly any condition that is perpetuated that can be demonstrated or proven to create a hardship not otherwise justified is certainly going to weigh against the government and the government's credibility when it says that it's is doing the best it can to deal with the situation given the totality of the circumstances.

With respect to this request that the Court clarify

Judge Hogan's order and determine whether or not it applies to Abdul Ghappar and Adel Noori, I'll hear briefly from the government and the defense in response to that.

So today there'll be no action taken on those four petitioners who have not provided direct authorization until the next friend issue is resolved. I'm asking the parties whether the four petitioners no longer considered enemy combattants should be joined with Parhat, and I think the parties, the petitioners, have indicated "yes", and I don't think there was any opposition from the government.

And I'm encouraging the government to determine whether the eight petitioners I've described as being in executive limbo are or are not enemy combattants as soon as possible because failing to do so is I believe not in keeping with what appears to be a reasonable course of action in this case.

All right. Mr. Subar, would you like to speak first?

MR. SUBAR: Thank you, Your Honor. On the major question which is before the Court that Your Honor just addressed, the question raised in the petitioners' motion for -- or motions I should say for parole or release into the United States, as Your Honor indicated, Judge Robertson determined that providing that kind of relief would implicate in a very fundamental and extremely serious fashion

considerations of separation of powers because the authority to determine who comes into the United States is a matter of executive authority; it's an executive branch matter and not for some technical reason. It's because that goes -- particularly in a case like this -- to very serious important and sensitive diplomatic and similar considerations.

Beyond that, beyond the question of the fact that that is an issue to under the Constitution to be resolved by the executive branch rather than by the courts, I'd like to address some of the points that Your Honor made with regard to changes since Judge Robertson issued that ruling. There have been a couple of changes, but those changes favor the government in this regard.

One thing to keep in mind I think, Your Honor, is that one thing that didn't change is the fact that as the Supreme Court held in the Mezei case -- if I'm pronouncing that correctly -- that was decided more than 50 years ago and still stands as good law, if someone is outside the United States for these sorts of purposes, that person can't be paroled in habeas context into the United States, and in the Mezei case as it happens, the petitioner was on Ellis Island and because that person hadn't entered the United States as a legal matter, he was considered to be outside the United States, which is very distinct from the situation in cases like Zadvydas and Clark that the petitioners rely on.

In those cases, the petitioners had been admitted into the United States and because of things that happened subsequently, they were detained and the question was whether in the context of immigration matters they could continue to be detained. In both of the cases that I just mentioned, Zadvydas and Clark, what the Supreme Court dealt with was the interpretation of an immigration statute which allows the executive branch to detain someone pending deportation or the like.

And what the Supreme Court said was that there's a limit to the length of time that someone in that particular context could be detained, in other words, statutory interpretation because the individuals in those cases had been in the United States already, and the Court carefully drew a distinction in those situations where the people were physically and legally in the United States and the situation in Mezei where, at least, legally, the person had not entered the United States.

Here, of course, legally, Mr. Parhat and the other four people in his position have not entered the United States and physically they're certainly not in the United States, either. So one thing that controls this situation is the Supreme Court decision in Mezei, which, as I say, it still stands as good law.

There have been, of course, as Your Honor indicated

decisions both by the Court of Appeals in Parhat and by the Supreme Court in Boumediene since the Qassim case was decided, but those don't help the petitioners for the following reasons. First of all as to Parhat, the Court of Appeals certainly did not decide that the release that it was talking about that it provided to the government as one option as far as a way forward is concerned meant release into the United States and less this Court be inclined to determine whether that seems to be what the Court of Appeals meant, I'd point out that the government has filed a rehearing petition in that case asking the Court of Appeals to make clear what seems to already be clear -- but I should say to make more clear -- that the Court of Appeals when the refers to release as an option did not mean release into the United States. So that takes care of the Parhat decision.

As far as Boumediene is concerned --

THE COURT: Well, was the specific issue raised in Boumediene by argument or otherwise that this would be a release into the United States, not permanently, but pending some final resolution by the government?

MR. SUBAR: In Parhat?

THE COURT: Or both.

MR. SUBAR: Or Boumediene. Certainly, the Court in neither case I'm quite sure spoke to that issue as other than to I guess to a certain degree leave the question open or at

least subject to enough debate in Parhat that we saw fit to ask the Court of Appeals to clarify its point -- to clarify the point by way of rehearing.

THE COURT: And the alien in the Mezei case you say he was not in the United States.

MR. SUBAR: That's right. Because he was on Ellis Island.

THE COURT: I understand.

MR. SUBAR: He had been in the United States. He left. He was overseas. And he attempted to come back, and he was stopped at the border. So he was -- in the Mezei case, he was even more in the United States, if you will, than the petitioners here.

THE COURT: Had he been determined to do some harm to the United States?

MR. SUBAR: There was some question in that regard as to what his background was. I don't believe that he had -- I'm not a hundred percent certain of this, but I don't believe that he had actually been determined to be engaged in actual harm. It was more a question of I believe that he had been deemed to have had a relationship with the Communist Party with communism.

The other -- one of the other things that's changed since the Qassim case that again supports the government rather than supporting the petitioners is that the Supreme

Court issued in Munaf -- that was same day as it decided Boumediene -- as it happens, the Munaf decision was a unanimous decision by the Supreme Court in which the question was whether two individuals held by the allied forces, MNFI, in Iraq could -- were entitled to habeas relief, to essentially protect them from being transferred to the Iraqi government.

There the Supreme Court said that habeas wouldn't be appropriate because even though the petitioners framed the matter in terms of release, it wasn't really a question of release. What the petitioners wanted was protection by the United States from transfer elsewhere, and, here, as we point out in our papers on these motions, that's really essentially what's going on. What the petitioners want isn't release; if they wanted was release, then, as we say in our papers, they need to go to China, which Your Honor recognizes isn't an option, or they would be released in Cuba to the Cuban territory or to the territory where the United States has a closed military installation. I can't even imagine how such a release would happen. Bringing them here to the United States wouldn't be release, it would be what the Supreme Court said was not available in Munaf.

So, yes, there have been legal developments since Qassim, but those legal developments, if anything, strengthen the government's position in resisting the relief that the

petitioners want as opposed to undermining it. So for those reasons we'd submit, Your Honor, that those motions should be denied. Thank you.

THE COURT: Thank you.

MR. MCGARAGHAN: Good afternoon, Your Honor.

THE COURT: Good afternoon, sir.

MR. MCGARAGHAN: Neil McGaraghan, again. I'll address briefly, Your Honor, the question of the Mezei case which I think does lend to tell itself to very important distinctions. The first being that the petitioner in Mezei was somebody who voluntarily left the United States and voluntarily sought to return to the United States where he had lived for some period of time. It was a matter of his own doing, his own departure from the United States in that situation that created the problem upon his return.

We've got a very different situation here where the petitioners, now Parhat and the four others, were involuntarily brought by the United States government to a place where there is now no option of release as the government has just described other than bringing them to the United States. It's quite a different situation where they have been involuntarily put into this situation than where Mr. Mezei had voluntarily left the country.

Secondly, Your Honor, speaking to both the Clark and Zadvydas cases, those were cases of clearly inadmissible

aliens which puts them, in the government's view, in the same position as these petitioners. These are, according to the government, inadmissible aliens; nonetheless, the Supreme Court decided that they were required to be released into the public, into the free public within the United States notwithstanding not only their inadmissibility, but their -- according to the certain description in those cases -- significant of dangerousness.

Again, I think those two cases, if anything, lend themselves much more to the situation we have here and to a degree possibly suggest that Mezei has been modified and in any event provide a closer analogy. Those are the I think principal issues for the petitioners to address at this time from the description of Your Honor -- of the parties' positions, that was the one that I wanted to be able to address based on what the government has just proffered.

Are there other questions that your governor -- I'm sorry -- that Your Honor would like the petitioners to address concerning the release motion?

THE COURT: Hold on. No.

MR. MCGARAGHAN: And I take it from the discussion that we already had today that the four others have been joined by oral motion or by consent to the motion, but if the Court would like a written submission to that effect, I'd be happy to provide that.

THE COURT: Well, there will be a minute entry made in the docket. With respect to this request that the Court enter an order clarifying Judge Hogan's order dated July the 10th concerning Abdul Ghappar and Adel Noori. Will you be addressing that, sir?

MR. STERNHELL: Certainly.

THE COURT: All right.

MR. STERNHELL: Your Honor, Michael Sternhell from Kramer Levin. We represent the petitioners Adel Noori and Abdul Ghappar. They were initially petitioners in the Mohammon case which was and still is pending in front of Judge Walton, and when they were petitioners in that case, the order recently entered by Judge Hogan in all of the Guantanamo habeas cases that are subject to his coordination, his earlier coordination order, Judge Hogan entered an order in all of those cases that required the government to provide 30 days notice to the Court and to petitioners' counsel before petitioners were transferred from Guantanamo.

So the order has already been entered as to Abdul Ghappar and Adel Noori when they were petitioners in the Mohammon case in order -- because the Mohammon case involved many petitioners, and it was the decision of this Court that all of the Uighurs be consolidated in front of Your Honor in order to separate out petitioners Abdul Ghappar and Adel Noori from the remaining non-Uighur petitioners in the Mohammon

case. They were given a new caption and case action number, so it's really just an administrative detail because the docket in their current case number does not reflect that they have the benefit of that order.

In any case, I understand that the government has moved to appeal that order. I expect that they will take that position, as well, with respect to these two petitioners, but we just want to make sure that they have the benefit of the order that was originally entered against them.

THE COURT: All right. Well, I understand what you're saying and that is that there was a case with Uighur defendants and non-Uighur defendants. I get all the Uighur cases, and, therefore, a new petition was filed so that the Uighurs in that case could be moved out and put on my calendar. So there is no entry of as of now in the new case that Judge Hogan's July 10th order is effective in this case.

MR. STERNHELL: That's correct.

THE COURT: All right.

MR. STERNHELL: And I'll add that every other petitioner before Your Honor -- every other Uighur petitioner before Your Honor currently has the benefit of Judge Hogan's 30-day order.

THE COURT: All right. Thank you.

MR. STERNHELL: Thank you.

THE COURT: All right. I think I can anticipate

your position, Mr. Subar, given that the issue has been appealed. You might as well have the whole package of rulings before the Court of Appeals. Do you seek -- do you object to the motion that's been made?

MR. SUBAR: To the extent that what Mr. Sternhell just spoke to was a motion, but a separate motion for that relief, we would object, although, I think that he is correct that Judge Hogan's original order allowing for -- requiring 30-days' notice did apply to these two particular petitioners.

We objected before to that sort of relief, we would object again, but, again, I think it's covered -- the one thing I would want to make sure is that our appeal that we already filed includes the these two particular petitioners within its ambit for purposes of appealing that order.

THE COURT: All right. Well, then to facilitate that, I'll simply overrule your objection and rule that Judge Hogan's July 10th order does apply to these two gentlemen.

MR. SUBAR: Okay. And then, I take it, in order to wrap it up with a bow I guess, we would be expected to -- if we want to pursue the appeal as to these two particular petitioners -- file a notice of appeal or does the other notice of appeal govern or maybe that's a question for the Court of Appeals?

THE COURT: Well, my guess is that you would need to file a separate notice because it's a separate case number.

MR. SUBAR: Okay.

THE COURT: And we'll make a docket entry so that it's clear what you're appealing.

MR. SUBAR: Okay. Thank you, Your Honor.

MR. TIRSCHWELL: Your Honor, if I may, Eric Tirschwell, Kramer Levin. I just wanted to briefly address the timing of the government's response with respect to the eight additional petitioners who as we've represented have direct authorization, but as to whom the government has not taken a position on their enemy combattant status, and we certainly agree with what the Court has articulated and have been urging the government to take that position and let us know as quickly as possible.

Quite frankly, in our view, it's indefensible that two months after Parhat and Boumediene, we don't yet know whether the government will treat these additional Uighurs who in filing after filing and document after document some of which we put before the Court, the government has said are all similarly situated, we just can't understand why we still don't have the answer as to whether they will be considered non-enemy combattants, as well.

Obviously, Judge, our goal is to get the remaining Uighurs onto the same track as Mr. Parhat and now the four others; that is, we'd like to be able to join them in the motion for immediate release, and we'd like to, obviously,

with the Court's assistance, we'd like to try to get them out of this multi-year detention that they have been suffering.

THE COURT: Now, we're talking about two types of relief here; one is the resolution of the petition for a writ of habeas corpus, which is the final resolution short of some decision on the government's part to moot that, and then we're talking about the interim relief, I'll call it, which is release into the United States pending the final resolution; is that right?

MR. TIRSCHWELL: Yes. Yes.

THE COURT: All right.

MR. TIRSCHWELL: And, again, we've tried to make clear in these status reports, as far as we can tell, the only distinction between Mr. Parhat and the other four as to whom the government has essentially, as they describe it, conceded the merits of the habeas petition and the remaining Uighurs is that they were forced because of court deadlines and looming court decisions to take a position in those cases, and, as of yet, we haven't been able to force them to take a position. Obviously, Your Honor, we believe and we are urging the Court to force them to take that position and not 40 days from now which is what they're saying. I think we suggested August 28th, which is one week from now, recognizing that they've had months --

THE COURT: August 28th?

MR. TIRSCHWELL: That's what we asked for, yes, Judge. And that would allow us to move onto the next stage where we hope to be able to get meaningful relief for our clients.

THE COURT: So you're asking the Court to direct the government to provide some -- to take a position with respect to these other eight by August 28th?

MR. TIRSCHWELL: Yes, sir. And we would include the remaining 12. We understand there may be next friend issues down the road, although, I think for purposes of forcing the government to take a position on whether they're enemy combattants or not, the next friend issue is not something that shouldn't hold that up.

I understand Your Honor saying you may not be able to take any action as to those four until there's further information, but we do think, and, in fact, we had prepared a motion which we were about to file and could still file, but Your Honor's status report, whereas, we thought sort of mooted it, but we were going to file a motion asking that the Court require the government to state its position as to whether they're going to amend their returns or even file returns or whether they're going to concede as they have for the other Uighurs that the remaining petitioners are non-enemy combattants.

So whether it's through a motion or through a

request that we made in the status report, we're urging Your Honor to do that, and we just -- it's hard for us to understand, and the government, quite frankly, has not articulated with any specificity why they need this additional time and why they haven't decided today.

And so we're urging the Court to direct them to do that as quickly as they can.

THE COURT: Thank you.

MR. TIRSCHWELL: Thank you.

THE COURT: Does anyone else from the petitioners' side wish to be heard? I already heard from you.

MR. STERNHELL: Yes, Your Honor. With your permission, I'd like to address just one other issue, and it was something that Mr. Subar eluded to earlier on, and it has to do with the government's position not just as to these remaining eight Uighur petitioners, but as to Parhat and the four additional Uighurs who they've agreed to afford the same exact treatment.

It's important to I think listen to the language that the government is using. They have not reclassified Mr. Parhat or his four companions as not enemy combattants or even to use their own preferred terminology "no longer enemy combattants". Instead, the government has merely indicated they that they will treat these five petitioners as though they were no longer enemy combattants, and we would submit

that this is not just a semantic distinction.

An adjudication of these habeas petitions I think begins with consideration of what authority the government has to detain these people. The government asserts that it can detain enemy combattants indefinitely pursuant to Congress' authorization to use military force, and that is an authority that was recognized by the Supreme Court in the Hamdi case.

The government also claims that it can detain individuals it concludes are no longer enemy combattants pursuant to the power to windup war-time detentions in an orderly fashion. There has been discussion here today as to whether or not that windup power has adequate support, but we think that in order to adjudicate certainly the issue of remedy in these cases and certainly the issue of the merits, we need to know for each petitioner what their current status is, and that includes the five petitioners who the government has agreed that it will treat as though they were no longer enemy combattants.

THE COURT: Those are Parhat, Semet, Jalaldin, Ali, and Osman?

MR. STERNHELL: That's correct. Thank you, Your Honor.

THE COURT: Starting with that last point, Mr. Subar, is this just a semantical distinction or is there something lurking there that really makes a difference or will

make a difference down the line?

MR. SUBAR: For purposes of litigation in this court, I don't think that there's anything that makes any difference whatsoever. I'm not sure that Mr. Sternhell really understands what he's asking for, though. In a sense, he's saying, well, the Department of Defense hasn't formally gone through the process of making another determination. It made a determination that these people are enemy combattants. It hasn't gone through the process again to remove that designation, and he's saying the formal process should be gone through.

If the formal process was followed, we don't -- Mr. Sternhell doesn't know. I don't know. Your Honor doesn't know what the result of that will be. If at this point in time and going forward, the government's position is we're giving up the opportunity, have given up the opportunity, to go through that formal process of determining whether the enemy combattant label stays or goes, therefore, going forward, the -- as a technical matter, the decision was made that these people are enemy combattants, but now for future purposes, the Department of Defense will treat these people as they're not enemy combattants.

So for purposes of litigation in this court and what happens going forward, it's really just a semantic difference with no real meaning. If Mr. Sternhell or Mr. Sternhell's

clients have their way in terms what he's advocating, then there'd have to be an additional determination at the administrative level, perhaps, or purposeless proceedings in this court to make a determination that the government has already announced it won't resist. Neither of those makes any sense. So that's our position there.

With regards to the earlier point as to the timing of a determination as to others aside from Mr. Parhat and the four as to whom decisions have been announced more recently. There is a schedule in these cases. That schedule is set by Judge Hogan. It calls for the submission of factual returns for those petitioners whose cases the government is resisting.

Under that schedule, factual returns wouldn't be due for any of the Uighurs until the end of September. As it happens, that would be true even with regard to Mr. Parhat and the other four as to whom a decision was just announced.

If an order was entered requiring a decision before the end of September, Judge Hogan's schedule would be upset. It would essentially be thrown out the window, and that wouldn't be fair to Judge Hogan or the other petitioners in the other cases or the government and the process that's being gone through is an individualized review and when the decisions are made, they'll -- petitioners and Your Honor will be so informed, and as I've indicated the focus is on that end of September date. If decisions are made earlier than that,

we'll let the Court and petitioners know, as well.

And I would add just this one final note that what's sauce for the goose is sauce for the gander. There are four petitioners as to whom neither the Court nor we nor frankly petitioners' counsel know whether there will be direct authorizations. Petitioners have said they'll let us know -- by "us", I mean Your Honor and the government -- whether they'll get direct authorizations by the end of September. As a matter of fact, they've said even as to the others as to whom they have direct authorizations. We haven't gotten them yet. I have no reason to doubt that they exist, we just haven't gotten them, and in the status reports the petitioners have indicated that they'll provide that unless ordered to do so earlier. I suppose by the end of September in most cases and by some time in October in one case.

We think that it would be in keeping with Judge Hogan's schedule, and it would be most consistent with everything else that's happening schedule-wise if we stayed on the schedule that we've already discussed. Thank you.

MS. GILSON: Your Honor?

THE COURT: Yes, ma'am.

MS. GILSON: Elizabeth Gilson. I have a couple of points that I would like to argue that are based on the classified declaration of Clint Williamson that was filed yesterday. I've had a chance to go to the secured facility,

and I know that we'd either need to clear the courtroom or perhaps doing it by sidebar, but it directly relates to both the issues of the production of the records, the sameness of all 17 of the Uighur petitioners, as well as --

THE COURT: All right. Why don't you give me a minute or less, and then I'll call you to the bench if that's satisfactory.

MS. GILSON: Thank you.

(Whereupon, Judge Urbina and his law clerk conferred at this time.)

THE COURT: All right, counsel.

MR. SUBAR: Your Honor, before we approach the bench, there are some questions in my mind that I frankly don't know all the answers to with regard to simply discussing classified information at the bench. One question has to do with the status of the transcript and, frankly, the court reporter, and I don't know --

THE COURT: Have you been cleared?

MS. GILSON: Yes.

THE COURT: Have you been cleared?

THE COURT REPORTER: No, Judge.

THE COURT: No. Okay. All right. Well, we'll go back to the jury room for a few minutes, and we can discuss matters there. Who's going to be present?

MR. MCGARAGHAN: I would be present, Your Honor.

THE COURT: All right. And how long is this going to take?

MS. GILSON: Five or 10 minutes. Ten at the most.

MR. MCGARAGHAN: And, Your Honor, I also didn't realize that we were -- you expected me to address every point that I wanted to make about all the issues during the one segment that I had, and I did have one other point that I wanted to raise briefly if it's okay with you.

THE COURT: All right. Tell me what it is, and I'll tell you whether you need to talk about it.

MR. MCGARAGHAN: All right. The one thing that I think bears additionally on this question of the technical status of the detainees of NEC or still EC is that, for example, Mr. Parhat is now back in Camp VI and one of the other now NEC's is also in Camp VI, and it seems to me that if there is not a legal application of this term or meaning for the designation in the court proceedings, there may be a practical consideration of the designation of these people for purposes of their treatment at the base.

And so, for example, you have two men who are now either technically cleared or at least being treated as if they are cleared, but they are back in the Camp VI confinement. So it seems to me that --

THE COURT: Parhat is back in Camp VI?

MR. MCGARAGHAN: Yes. I believe for a disciplinary

infraction that maybe Mr. Sudry could speak more -- Mr. Subar could speak in more detail too, but he is back there, and petitioner Ali who is one who we've just now added to the group of five I think has been in Camp VI all along, and I believe still remains today.

MR. SUBAR: My understanding is that what counsel just said I think is correct at this moment. In part that's because -- in part, it's for disciplinary reasons, but in part it's because the place where they're going to be moved where there's somewhat more freedom of movement where the NLEC's from a few years ago were held isn't quite ready, but will be in a couple of days.

And at that point, these five, whether they're currently held at Camp IV or at Camp VI will be moved to this other location.

THE COURT: And do we know why Parhat and this -- well, why Parhat was moved from four to six.

MR. SUBAR: It was for disciplinary reasons, Your Honor, but there isn't a difference between an NLEC and someone who's considered to be a NLEC for these purposes as I understand it.

THE COURT: So a disciplinary reason can land anybody in Camp VI whether they're technically or practically considered an enemy combattant or not; is that --

MR. SUBAR: That's my understanding, yes.

MR. MCGARAGHAN: And this gets Your Honor to the overall question of the remedy because these men were cleared for release and in fact have been ordered to be released and yet they are subject to the ongoing rules of the camp that require them to spend time in Camp VI and be subject to disciplinary proceedings and actions, and it seems that the proposed remedy of the government is to keep trying to place them someplace else, but to not actually have to release them at any time soon, and yet here they stay cleared men ordered to be released subject to being held in solitary confinement or virtual solitary confinement.

THE COURT: Well, I think I already made it clear in my first opinion that the Court is -- at least as of this time based on what the Court has learned about how the different camps operate and what type of relief can be granted under the law as it currently exists -- I'm not inclined to intervene in matters related to transfer from one camp to the other, however, the institution has the obligation and the right to impose restrictions and rules that must be followed in order for that detention center and its various parts to operate effectively.

And I don't know why Mr. Parhat was moved from four to six. I do understand the distinction between those two camps which is quite substantial. I don't know what the disciplinary -- what the infraction was I should say, and so I

can't comment on that. All I can say is that there's a certain amount of restlessness and unhappiness and consequently a certain aspect of disenchantment as expressed or otherwise that might reasonably be anticipated in a person who's been locked up for seven years and never having been convicted of anything, and the reasonableness of how one determines whether something was an infraction needs to take that into consideration.

Again, I don't know what the infraction was. I will find out, and if I believe that the government is acting -- not this prosecutor, not this gentleman, of course, not Mr. Subar, but if I think something is awry, then I will act on it. I also understand -- and this is not classified -- I also understand that there have been a number of situations that have arisen with respect to the interrogation of the Uighurs which appear to run contrary to what these people were assured would happen; one of which was having a Chinese interrogator when these people were told no Chinese interrogator would participate in interrogation.

Now, is that something that would make an individual trust his captors less or react to them in a certain way, perhaps. So it is your job, I suppose, to be vigilant and to alert the Court of what's going on. I can't rule on something when I don't know what I'm ruling on, but I've said enough about that.

MR. MCGARAGHAN: No. Thank you, Your Honor, and I understand and appreciate the Court's prior ruling on the conditions of confinement issue. I think I'm just making an additional plea on top of our papers for the urgency of the relief requested, the release relief requested.

THE COURT: All right. We'll retire momentarily to the jury room.

MR. MCGARAGHAN: Thank you, Your Honor.

(Whereupon, the Court and counsel retired to the jury room at this time.)

THE DEPUTY CLERK: Remain seated. This Honorable court is again in session.

THE COURT: All right. I think we're about done. Let me just say one or two things quickly. As far as this issue of whether there is a real difference between the people we're speaking of as being not enemy combattants or being treated as not being enemy combattants, the position -- my interpretation of the government's position is that there really is no distinction. The government has said that, certainly, there's no distinction that would render one of these individuals more likely to be chastised or punished for an infraction, and I interpret the government's position in a way that I would conclude estops the government from making this distinction in the future for any reason work adversely against these Uighurs; that's number one.

Number two is I'm going to follow the government's suggestion on the return date of September the 28th as being the deadline for the designations; is that what you said, Mr. Subar?

MR. SUBAR: I believe it was September 30th.

THE COURT: September 30th. That's fine. September the 30th. It's probably more time than the petitioners would like, but I believe it would be a reasonable deadline for the articulation and the various matters that are due to be disclosed or stated on that day. Also, that would be a deadline for a firm determination of the authorizations involved, and we should have a hearing -- well, Mr. Dales -- are the parties asking to have another in-court hearing around that time or are you asking the Court to act on submissions or joint status reports?

MR. MCGARAGHAN: We were anticipating, Your Honor, a hearing on the motion for release, although, I wonder if today was in effect the hearing Your Honor had anticipated, but we're certainly prepared to do a more thorough presentation and had been anticipating that we would and had been looking forward to that.

THE COURT: All right. Then, why don't we pick a date, Mr. Subar, around a little after the 30th of September, shortly after, at which time we'll address all the issues -- well, at which time we'll become current on the information

the parties say they'll have, the authorizations and the positions with respect to placement, and I'll also hear whatever arguments the parties wish to submit a supplemental arguments on the substantive issues -- substantive issue. All right.

MR. MCGARAGHAN: That's fine, Your Honor.

THE COURT: Does either side wish to -- I don't need any more paper -- but does either side wish to have additional submissions authorized?

MR. SUBAR: Other than just brining Your Honor up to date on whatever information we have by then, I don't think so.

MR. STERNHELL: Your Honor, I think, again, we will be exercising best efforts between now and the end of September to secure the four additional direct authorizations from our clients. In the event, we're not able to secure direct authorizations from all four of them, we would like the opportunity to make a written submission to the Court explaining why we think their petition should not be dismissed on that basis.

THE COURT: And by when would you be able to make such a submission? I need time, we need time for --

MR. STERNHELL: I think within one week of the deadline.

THE COURT: Well, how much time will that give the

government then to respond?

MR. SUBAR: I guess, Your Honor, we would take the normal motion response time that would work for us which would be -- it would work out to 14 days after that date.

MR. TIRSCHWELL: Your Honor, why don't we suggest that by the deadline September which would be September 28th or --

THE COURT: Thirtieth.

MR. TIRSCHWELL: Thirtieth. We either will file the direct authorizations or we will file papers with respect to why we think the petitions should not be dismissed and ask the government to respond as quickly as possible so we can come in and talk about the issues as quickly as possible after that.

THE COURT: All right.

MR. SUBAR: It sounds like that would be in the nature of a motion, so we would ask for regular motion time after that --

THE COURT: Well, I usually don't -- I don't need to follow regular motions' time. I try to accommodate my schedule and the realities of what's involved. Hold on.

(Whereupon, the Court conferred with the deputy clerk and law clerk at this time off the record.)

THE COURT: All right. Let's do it this way, counsel. The authorizations or in lieu of the authorizations a motion addressing why those affected petitioners' matters

should not be dismissed will be filed by September the 30th, and we'll have a hearing on October the 7th, at which time, we'll see where things are, and I can set up a deadline -- a short turnaround because, Mr. Subar, if you are going to be responding, you'll already know for quite some time what petitioners' position is, so I'll give you a very short turnaround.

MR. SUBAR: That's fine.

THE COURT: And then we'll set up a formal motions' date.

MR. SUBAR: Okay.

THE COURT: All right.

MR. MCGARAGHAN: And Your Honor, I don't know if it works at all, and I think Mr. Subar might have a different view or does have a different view, but we are I think I would fairly characterize us as somewhat desperate to have the hearing on the release motion as soon as possible, and we would be happy to separate it from the October 7th hearing if you were contemplating putting them together.

It may be that from the Court's schedule and counsels' schedule --

THE COURT: To have the release hearing on Parhat.

MR. MCGARAGHAN: Yeah. Right. On Parhat and the other four which I guess whatever the outcome is going to determine the outcome for the remaining petitioners as soon as

there's a determination made on whether they're the same as Parhat.

THE COURT: As far as you're concerned, all of the submissions relevant to that are in?

MR. MCGARAGHAN: Yes, Your Honor.

THE COURT: What does the 30th of September look like, Mr. Dales?

MR. SUBAR: Your Honor, that date happens to be the first day of Rosh Hashanah. I know that's me, but --

THE COURT: Oh, I'm sorry. I'm sorry. October the 7th.

MR. SUBAR: October the 7th works.

THE COURT: For a hearing and a status call on the other matters.

MR. MCGARAGHAN: I'm sure October 7th works. My hope is that we would be able to sometime do the hearing on the motion for release well before October 7th, but that's my appeal to the Court.

THE COURT: Motion for release meaning on parole or --

MR. MCGARAGHAN: I'm sorry. The motion for parole which is full briefed, and I believe ready for a hearing.

MR. SUBAR: I think, Your Honor, the most efficient for everyone is if we came in on that one day and dealt with the hearing on the petitioners' motions insofar as it relates

to however many petitioners it relates to at that point.

We'll discuss the timing of our response to whatever position the petitioners are taking as to the authorizations if there are any still in dispute or outstanding, and we can do all of that in one fell swoop.

MR. MCGARAGHAN: And Your Honor, I appreciate the burden that it imposes on everybody to have to give a separate hearing, and I do -- and certainly it's a burden for the people who have to travel from out of town, but their clients are day-by-day deteriorating and so October 7th is --

THE COURT: If September 30th were the date -- well, I'm sorry. It can't be September 30th. I don't -- do we have any room to have a hearing in September?

(Whereupon, the Court conferred with the deputy clerk at this time off the record.)

THE COURT: It's going to have to wait until October the 7th.

MR. MCGARAGHAN: Thank you, Your Honor.

THE COURT: We'll have the hearing on that day and also the other counsel will submit the status of matters, and we'll proceed from there.

MR. SUBAR: Judge, is there a particular time or will you be issuing that by minute entry?

THE COURT: No, 10:00.

MR. TIRSCHWELL: Judge, just one other housekeeping

matter. So we're clear, I understood the government to be saying, I think, that on September 30th they're going to actually either file returns as to all the remaining Uighurs or notify us that they're viewing them as not enemy combattants.

THE COURT: That's my understanding.

MR. TIRSCHWELL: Okay. Although, the status report, according to Judge Hogan's order, I think some of the Uighur petitioners according to this report their returns are not due 'til October 31st, so I just wanted to make sure we're al on the same page.

MR. SUBAR: I appreciate that clarification. It is an important one, although, it might turn out to be an irrelevant one, but it is an important one. Under Judge Hogan's schedule, some of the returns aren't due until the end of October.

THE COURT: So what were you going to report then --

MR. SUBAR: By the end of September?

THE COURT: Yes.

MR. SUBAR: Whether all of the remaining Uighurs are put into the same category as Mr. Parhat and other four; that is, we're not planning on saying as to the six or so whose returns are due the end of September, we'll report by the end of September; as to the others, we'll report by the end of October.

The plan is to make a decision as to all of the remainder by the end of September if the decision isn't made at that point to treat them all as Mr. Parhat, then the ones whose returns are due the end of September will be filed by the end of September; the ones whose returns are due by the end of October will be filed by the end of October. That's the current plan.

I suppose in theory it's possible that if we decide to proceed with returns for one or two or however many of the October ones at the end of September, over the course of October, we'll say no, no, no. They'll go into the Parhat category, if you will, but that's not the plan. The plan is to make all of the decisions by the end of September. Thank you.

THE COURT: All right. Well, let's make that plan an order and modify Judge Hogan's order accordingly. Everything is to be in by September the 30th.

MR. TIRSCHWELL: Judge, just so we're clear, including the returns?

THE COURT: Yes.

MR. SUBAR: And does that include the ones as to whom there might end up not being any authorizations? I'm not sure if any of those are in the September group.

THE COURT: Well, there's only four of those, right?

MR. SUBAR: That's correct.

THE COURT: No. It doesn't include them because I need to be persuaded that if the authorizations are not forthcoming what if any alternative theory would permit the Court to proceed accordingly.

MR. TIRSCHWELL: Judge, on that point, could I just make one suggestion?

THE COURT: I'm counting, one suggestion. Go ahead.

MR. TIRSCHWELL: Okay. The suggestion is that jurisdictional issue is the jurisdictional issue and when the Court gets to it, obviously, the Court will have to decide, but in the meantime, I would respectfully suggest that it is incumbent upon the government to make an assessment about whether those individuals -- whether or not they are properly before this Court -- are lawfully detained as enemy combattants or not, and so I think they ought to have to report to the Court whether or not ultimately their next friend status is validated or not.

I don't see why one, quite frankly, relates to the other at this point.

MR. SUBAR: I'm not sure that our positions are necessarily different on this point. Our plan, as I indicated, to make the decision as to all of them by the end of September, the factual return question is a separate question; that is, as Your Honor has indicated, we shouldn't have to actually produce a factual return as to those four if

there isn't an authorization for them, but the determination of whether they will be put in the same category as Mr. Parhat or not, that is a different matter, and we're planing to proceed with that decision with the --

THE COURT: Well, that decision and the position that's taken relative to all of them will be in by September the 30th.

MR. TIRSCHWELL: Understood, Your Honor.

MR. SUBAR: Thank you.

THE COURT: All right. Again, thank you for the quality of your submissions, and I'll see you.

THE DEPUTY CLERK: All rise. This Honorable Court stands adjourned until further notice.

[End of proceedings]

C E R T I F I C A T E

I, Wendy C. Ricard, Official United States Court Reporter in and for the District of Columbia, do hereby certify that the foregoing proceedings were taken down by me in shorthand at the time and place aforesaid, transcribed under my personal direction and supervision, and that the preceding pages represent a true and correct transcription, to the best of my ability and understanding.

Wendy C. Ricard

Wendy C. Ricard, RPR, CCR
Official U.S. Court Reporter

EXHIBIT D

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

IN RE:	Misc. No. 08-442 (TFH)
GUANTANAMO BAY DETAINEE LITIGATION	Civil Action No. 05-1509 (RMU) Civil Action No. 05-1602 (RMU) Civil Action No. 05-1704 (RMU) Civil Action No. 05-2370 (RMU) Civil Action No. 08-1310 (RMU) Civil Action No. 05-2398 (RMU)

PETITIONERS' JOINT MOTION FOR PROCEDURES TO GOVERN OCTOBER 7, 2008, HEARING

Petitioners Abdul Nasser, Abdul Sabour, Abdul Semet, Hammad Memet, Huzaifa Parhat, Jalal Jalaldin, Khalid Ali, and Sabir Osman in *Kiyemba v. Bush* (No. 05-1509 (RMU)), Edham Mamet in *Mamet v. Bush* (No. 05-1602 (RMU)), Bahtiyar Mahnut and Arkin Mahmud in *Kabir v. Bush*, (No. 05-1704 (RMU)), Abdur Razakah and Ahmad Tourson in *Razakah v. Bush*, (No. 05-2370 (RMU)), Abdul Ghappar and Adel Noori in *Ghaffar v. Bush*, (No. 08-1310 (RMU)) and Ali Mohammad and Thabid in *Thabid v. Bush*, (No. 05-2398 (RMU)) are seventeen Uighurs detained at the Guantanamo Bay Naval Station. Petitioners move for an order substantially in the form attached hereto to govern the October 7, 2008, hearing.

As grounds, Petitioners say:

1. Petitioners fall into the following four categories:

(a) Petitioner *Huzaifa Parhat* (*Kiyemba*) has been adjudicated to be a non-combatant. *Parhat v. Gates*, 532 F.3d 834 (D.C. Cir. 2008). The government has waived any right to contest that adjudication.

(b) As to the four *Kiyemba* Petitioners, Khalid Ali, Sab'r Osman, Abdusemet and Jalal Jallaladin, on August 18 the government moved in the Court of Appeals to enter the *Parhat* judgment in their cases. The Court of Appeals has not yet entered such orders, but Petitioners have joined in the motion and that relief is expected by all parties.

(c) Eight more Petitioners have precisely the same factual background as

Parhat, are held on the same theory of affiliation with the East Turkestan Islamic Movement ("ETIM") as he was, and accordingly are entitled to the same non-combatant judgment: Abdul Nasser, Abdusabour, and Hammad (*Kiyemba*), Ali Mohammad and Thabid (*Thabid*), Bahtiyar Mahnut (*Kabir*), Abdur Razakah (*Razakah*), and Abdul Ghappar (*Ghaffar*). At the moment, however, the Department of Defense continues to designate them as "enemy combatants." As to these Petitioners, this Court has ordered the government to advise by September 30 whether it will continue to maintain its position or whether it will concede that they ought to be treated as those in categories (a) and (b). The government has not advised of its position.

(d) The four Petitioners in the last category, Edham Mamet (*Mamet*), Ahmad Tourson (*Razakah*), Arkin Mahmud (*Kabir*), and Adel Noori (*Ghaffar*) are on information and belief held solely on the basis of an alleged affiliation with ETIM. Like Parhat, they are therefore entitled to a non-combatant determination. On information and belief, their factual circumstances are different (although not in a legally material way) from those in the three categories (a) through (c). As to these Petitioners as well, this Court has ordered the government to advise by September 30 whether it will continue to assert combatant status or whether it will concede that they ought also to be treated as those in categories (a) and (b). The government has not advised of its position.

2. The experience of a judicial hearing is likely to be an astonishing one for men who have been confined at Guantanamo Bay for more than six years without exposure to any judicial process and without previous exposure to the American justice system. It is therefore essential that Petitioners' counsel have a meaningful opportunity to meet with and prepare Petitioners for the hearing.

3. As to the hearing itself, Petitioners recognize that producing all seventeen Petitioners in person at a single hearing on October 7 would be logistically cumbersome, if not infeasible. Accordingly, Petitioners suggest that *four* Petitioners should be brought to the hearing and arrangements be made whereby the other Petitioners may view, hear, and (as the

Court may direct) participate in the hearing by video-link with Guantanamo.[1] Petitioners' counsel believe that the government can easily transport, and safely house, four Petitioners at a military detention facility or brig at Andrews Air Force Base, Norfolk Naval Station, Fort Belvoir, or elsewhere in the Washington, D.C. area, shortly before the hearing.

4. Given the logistics of translation, it will be a challenge for proceedings by video-link to be comprehensible and efficient for the Court or the parties in Guantanamo. Petitioners' counsel can best attempt to make them so by (a) being briefed as to the logistics of video-link by the government in advance of client preparation for the hearing, (b) having a Uighur translator present with Petitioners in Guantanamo, (c) meeting *collectively* with Petitioners to prepare them for the hearing, and (d) having a lawyer from the Guantanamo JAG office detailed to assist with coordination. Separate meetings between counsel and individual Petitioners, which are the usual Guantanamo practice, would be utterly unworkable as a practical matter. There is insufficient time, the process of devoting days at Guantanamo to seventeen separate Petitioners would be cumbersome, and highly expensive to Petitioners' counsel (all of whom are volunteers), and Petitioners have reached a high level of mistrust given the long confinement that can best be assuaged if counsel can meet with Petitioners collectively.

5. Petitioners' counsel also need sufficient access to those Petitioners that are transported to the Washington, D.C. area to prepare them for the hearing.

6. Petitioners' participation in the hearing will help the Court in addressing any logistical questions that arise from the various pending requests for parole and release, and will permit them an opportunity to respond to any points raised by the government.

7. Presence at, and access to, the hearing will provide crucial assurance to Petitioners that there actually is a judicial process underway and that counsel are not interrogators. After long years at Guantanamo and an isolation regime that in some cases results in paranoia, many Petitioners simply do not believe that this process is actually occurring, and

[1] We understand from other cases that the government has been discussing making video-links available.

Petitioners have no independent way to verify that judicial process is occurring.

8. Petitioners request that Petitioners Parhat (*Kiyemba*), Abdusemet (*Kiyemba*), Abdul Ghappar (*Ghaffar*) and Ali Mohammad (*Thabid*) be physically present at the hearing. These Petitioners represent three of the four Petitioner categories. Petitioners request that these four Petitioners be transported to the selected facility in the Washington, D.C. area no later than October 5, and that on October 6, counsel have full access to all four Petitioners collectively, for at least seven hours, in order to prepare for the hearing.

9. As to Petitioners remaining in Guantanamo for the hearing, we request the following procedures:

(a) For preparation purposes, a team of Petitioners' counsel should be permitted to meet with Petitioners collectively on the afternoon of October 5 (note, a Sunday) and all day on October 6 at Guantanamo Bay. Petitioners believe that this would be feasible within the courtroom at Guantanamo and in various areas within the camps, and would be facilitated by working with a JAG officer.

(b) On the morning of October 5, Petitioners' counsel should also be permitted to meet several Petitioners independently, including Petitioners from each facility where Uighurs are currently held, so that those Petitioners with whom counsel speak with may communicate with each other in advance of the hearing.

(c) Prior to these client meetings, Petitioners' counsel request a briefing from JTF GTMO as to how the video-link will operate so that counsel may prepare Petitioners to use the video-link.

(d) During client preparation meetings at Guantanamo on October 5 and 6, Petitioners' counsel at Guantanamo should have a telephone link with counsel on the East Coast.

(e) Petitioners understand that the government has recently acknowledged that

counsel may travel from Andrews Air Force Base to Guantanamo at a rate of $350.00 per flight. As this will greatly reduce the inconvenience of travel, Petitioners request that Petitioners' counsel be permitted to travel under these terms.

10. Petitioners suggest that in the event of logistical issues that cannot be resolved by agreement arising from the relief requested, the Court schedule a telephonic status conference.

11. It is the law of the Circuit that a non-combatant in Parhat's position is entitled to release or transfer, *Parhat v. Gates*, 532 F.3d at 836, and the question of remedy has already been fully briefed by the parties. Accordingly, the relief requested herein lies within the sound discretion of the Court and no further memorandum of law is necessary with regard to the particular logistical relief requested by this motion (which is not intended to address anything more than the logistics of the hearing itself). 28 U.S.C. § 2243 (Clause 5th) provides that, at a *habeas corpus* hearing, the government is required to produce the prisoner in person unless only issues of law are present, and this Court has broad discretion as a general proposition as to the logistics of its hearings.

12. On September 4, 2008, counsel advised the Justice Department by electronic-mail of their plan to move for this relief and requested assent. No assent has been given.

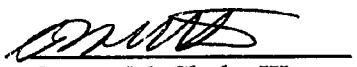
WHEREFORE, Petitioners jointly request that the court enter the attached order and grant to them such other and further relief as may be just and proper.

Dated: September 10, 2008

Susan Baker Manning
BINGHAM McCUTCHEN LLP
1120 20th Street NW, Suite 800
Washington, DC 20036-3406
Telephone: (202) 778-6150
Facsimile: (202) 778-6155

Sabin Willett (Pursuant to LCvR 83.2(g))
Neil McGaraghan (Pursuant to LCvR 83.2(g))
Rheba Rutkowski (Pursuant to LCvR 83.2(g))
Jason S. Pinney (Pursuant to LCvR 83.2(g))
BINGHAM McCUTCHEN LLP
One Federal Street

Respectfully submitted,



George M. Clarke III
D.C. Bar No. 480073
Miller & Chevalier Chartered
655 15th Street, NW, Suite 900
Washington, DC 20005
Telephone: (202) 626-1573
Facsimile: (703) 598-5121

Boston, Massachusetts 02110
Telephone: (617) 951-8000
Facsimile: (617) 951-8736

Counsel to Petitioners Abdul Nasser, Abdul Sabour, Abdul Semet, Hammad Memet, Huzaifa Parhat, Jalal Jalaldin, Khalid Ali, Sabir Osman and Edham Mamet

J. Wells Dixon (Pursuant to LCvR 83.2(g))
CENTER FOR CONSTITUTIONAL RIGHTS
666 Broadway, 7th Floor
New York, New York 10012
Telephone: (212) 614-6464
Facsimile: (212) 614-6499

Co-counsel to all Petitioners

Angela C. Vigil (Pursuant to LCvR 83.2(g))
Baker & McKenzie LLP
Mellon Financial Center
1111 Brickell Avenue, Suite 1700
Miami, Florida 33131
Telephone: (305) 789-8904
Facsimile: (305) 789-8953

Counsel to Petitioners Ali Mohammad and Thabid

Eric A. Tirschwell (Pursuant to LCvR 83.2(g))
Michael J. Sternhell (Pursuant to LCvR 83.2(g))
Darren LaVerne (Pursuant to LCvR 83.2(g))
Seema Saifee (Pursuant to LCvR 83.2(g))
1177 Avenue of the Americas
New York, New York 10036
Telephone: (212) 715-9100
Facsimile: (212) 715-8000

Counsel to Petitioners Abdur Razakah, Ahmad Tourson, Abdul Ghappar and Adel Noori

Elizabeth P. Gilson (Pursuant to LCvR 83.2(g))
383 Orange Street
New Haven, Connecticut 06511
Telephone: (203) 777-4050
Facsimile: (203) 787-3259

Counsel to Petitioners Bahtiyar Mahnut and Arkin Mahmud

EXHIBIT E

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

IN RE: GUANTANAMO BAY DETAINEE LITIGATION	Misc. No. 08-MC-442 (TFH) Civil Action No. 05-CV-1509 (RMU) Civil Action No. 05-CV-1602 (RMU) Civil Action No. 05-CV-1704 (RMU) Civil Action No. 05-CV-2370 (RMU) Civil Action No. 05-CV-2398 (RMU) Civil Action No. 08-CV-1310 (RMU)

RESPONDENTS' OPPOSITION TO PETITIONERS' JOINT MOTION FOR PROCEDURES TO GOVERN OCTOBER 7, 2008, HEARING

Respondents respectfully oppose Petitioners' Joint Motion for Procedures to Govern October 7, 2008, Hearing.[1] At the hearing that is the subject matter of this motion, the Court will hear legal argument on whether the Government may be compelled to parole Guantanamo Bay detainees who are treated as if they were no longer enemy combatants into the United States and elsewhere. Without so much as acknowledging the facial circularity of their Motion for Procedures, Petitioners move to have four of the Petitioners ordered into the United States so that they can be brought to Washington, D.C. to attend the arguments, and also seek an order under which the remaining Petitioners would participate via teleconference. On top of this extraordinary request, Petitioners also ask for various accommodations they deem necessary (but do not meaningfully justify) to prepare for and facilitate their attendance.

Petitioners' request to attend the October 7 hearing should be denied because it assumes,

[1]Petitioners assert that Respondents did not respond to an email seeking their assent to this motion. (Pet'rs' Joint Mot. for Procedures to Govern Oct. 7, 2008, Hr'g ¶ 12 ("Mot.").) While Respondents do not, in fact, assent to the motion, we have learned that Petitioners attempted to confer with Respondents by email, but the email was sent to an erroneous email address and was not received by Respondents before Petitioners' motion was filed.

before the fact, that the Court will decide that Petitioners have a right to a judicial order requiring their admission into the United States. That, of course, is the very issue to be heard at that hearing. Further, because the October 7 hearing involves only legal issues, Petitioners' participation is unnecessary and, in fact, would be a significant and unwarranted distraction. *See Qassim v. Bush*, 407 F. Supp. 2d 198, 202 (D.D.C. 2005) (denying petitioners' request to attend hearing because there were no factual issues relating to the legality of their detention). Likewise, the rest of the motion is without basis and seeks relief that would impose an entirely unwarranted burden on the Court and on Respondents. Therefore, the Court should deny Petitioners' motion.

STATEMENT

The facts regarding Petitioners' detention are chronicled at length in the underlying motions that are before the Court and elsewhere. Briefly stated, Petitioners traveled to Afghanistan as members of, or to receive training from, the East Turkistan Islamic Movement, an organization engaged in violent resistence to Chinese rule over portions of western China. *Parhat v. Gates*, 532 F.3d 834, 843-44 (D.C. Cir. 2008). During military operations in Afghanistan, Petitioners were captured and detained as enemy combatants. *See id.* The Government has previously stated that treats many of these detainees as if they were no longer enemy combatants. (*See* Resp'ts' Combined Opp. to Parhat's Mot. for Immediate Release into the United States and to Parhat's Motion for Judgment on His Habeas Petition 2, Aug. 5, 2008, dkt no. 147 ("Resp'ts' Combined Opp.").) For those Petitioners who are treated as if they were no longer enemy combatants, the Government is presently using its best efforts to release them; however, Petitioners object to their repatriation to their home country and the Government, consistent with its policy against returning individuals when it is more likely than not that they

will be tortured, will not return them involuntarily. (*Id.* 6.) Until these Petitioners can be released to another country, they will reside in a Guantanamo Bay facility where they will enjoy far greater liberties than other detainees. (*Id.*)

An outstanding legal issue as to these detainees, on which the Court will hear legal argument on October 7, 2008, is whether the Government can be compelled to parole or release these Petitioners into the United States as they await release to another country. For the asserted purpose of addressing possible logistical questions regarding their pending request for parole and release, and so that they may be assured that the judicial process is underway, Petitioners seek to attend the hearing in person.[2] (Mot. ¶ 3.) Supposedly to facilitate their participation, Petitioners also ask for other accommodations, such as preparation time, individually and collectively, with their counsel. (*Id.* ¶¶ 4-5, 9.)

ARGUMENT

RESPONDENTS SHOULD NOT BE COMPELLED TO BRING PETITIONERS TO THE HEARING OR TO PROVIDE THE OTHER PERQUISITES PETITIONERS SEEK BECAUSE LOGIC, LAW AND PRACTICAL CONSIDERATIONS ALL COUNSEL AGAINST SUCH RELIEF.

There is no basis supporting Petitioners' request to attend, by being brought to Washington, D.C., legal arguments on the very question of whether they brought to the United

[2]Petitioners indicate that they believe that teleconferencing might be available. Although the Court has no reason even to consider granting the present motion for the reasons discussed below, the technical feasibility of teleconferencing presents substantial challenges that would require coordination with the Court Security Officers, and may not be available as of the hearing date.

States while awaiting release.[3]

1. The present motion should be denied because it seeks, through interim relief, to fundamentally change the status quo in advance of the October 7 hearing. Indeed, the motion assumes a particular resolution of the very issue to be argued at the October 7 hearing to which the present motion relates: whether Petitioners, who are treated as if they were no longer enemy combatants, are entitled to a court order requiring their entry into the United States. As respondents have explained elsewhere, that question should be resolved in favor of Respondents for the reasons given in opposition to the motions to be argued on October 7. *See* Resp'ts' Combined Opp.; *Shaughnessy v. United States ex rel. Mezei*, 345 U.S. 206, 216 (1953). But however that issue is decided, the Court should certainly not issue an order allowing entry into the United States of aliens without any other right to such entry for the purpose of attendance at a hearing on the question of whether they have any such right. Where, as here, there are substantial arguments in support of Respondents' position, *see, e.g. Qassim v. Bush*, 407 F. Supp. 2d 198 (D.D.C. 2005), granting of interim relief prior to a hearing on the merits is unwarranted.

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[3]As an initial matter, the relief for which Petitioners move is not within this Court's jurisdiction to grant. As discussed in the text, Petitioners have no right to an order compelling their presence during the legal argument at the October 7 hearing. Consequently, Petitioners' request to attend legal argument is certainly not an element of core habeas relief. Still less so is any question as to when, where, or how counsel may meet with a petitioner before the hearing. Therefore, the limitation of this Court's jurisdiction found in 28 U.S.C. § 2241(e) as to non-core habeas matters is a bar to the present motion. *In re Guantanamo Bay Detainee Litigation*, No. 08-MC-442 (D.D.C. Sept. 22, 2008) (dkt no. 293), slip op. at 2 (holding that "§ 7(a)(2) [of the Military Commissions Act of 2006] remains valid and strips it of jurisdiction to hear a detainee's claims that 'relat[e] to any aspect of the detention, transfer, treatment, trial, or conditions of confinement'") (quoting 28 U.S.C. § 2241(e)(2)); *see also In re Guantanamo Bay Detainee Litigation*, ___ F. Supp. 2d ___, 2008 WL 3155155, at *3 (D.D.C. Aug. 7, 2008) (quoting *Boumediene v. Bush*, 549 U.S. ___, 128 S. Ct. 2229 (2008)).

2. Relevant law requires denial of this motion. Petitioners' sole legal citation in support of their extraordinary request to have Petitioners attend and participate in the October 7 hearing is 28 U.S.C. § 2243.[4] Even if Section 2243 applied in this case, contrary to Petitioners' assertion, Section 2243 does not require the Government to produce them;[5] rather, that provision and its associated case law clearly hold that a habeas petitioner need be brought to a hearing only when there are outstanding factual issues relating to the legality of his detention. Only "'[w]here . . . there are substantial issues of fact as to events in which the [petitioner] participated, [should] the trial court . . . require his production for a hearing.'" *Klein v. Smith*, 559 F.2d 189, 201 (2d Cir. 1977) (quoting *United States v. Hayman*, 342 U.S. 205, 223 (1952)). Where, as here, "only questions of law [are] at issue," "[t]here [is] no necessity for [petitioner's] presence at the hearing." *United States ex rel. DeFillo v. Fitzpatrick*, 378 F.2d 85, 87 (2d Cir. 1967) (citing *United States ex rel. Mitchell v. Follette*, 358 F.2d 922, 928 (2d Cir. 1966)); *cf. Bozel v. Hudspeth*, 126 F.2d 585, 586 (10th Cir. 1942) ("The presence of the petitioner at the trial is not an essential requisite to the proceedings upon the issues raised[.]"). Modern habeas practice under Section 2243, therefore, is to resolve the petition for habeas corpus "without requiring the

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[4]Because the Military Commissions Act of 2006 eliminates statutory habeas for these petitioners in its entirety, and is unconstitutional only to the extent that the Suspension Clause mandates habeas review in this context of its own force, the only appropriate procedures are those required by the Constitution itself. See *Boumediene*, 128 S. Ct. at 2278 (Souter, J., concurring) ("Subsequent legislation eliminated the statutory habeas jurisdiction over these claims, so that now there must be constitutionally based jurisdiction or none at all."). Therefore, the habeas statute should not be viewed as even applicable here other than, at most, by analogy.

[5]The portion of Section 2243 that Petitioners' rely upon states that "[u]nless the application for the writ and the return present only issues of law the person to whom the writ is directed shall be required to produce at the hearing the body of the person detained." 28 U.S.C. § 2243.

presence of the petitioner before the court that adjudicates his claim." *Braden v. 30th Jud. Cir. Ct. of Ky.*, 410 U.S. 484, 498 (1973). This has led one court to observe that "actual production of the petitioner's body in court is necessary" only in "a vanishingly small category of cases." *Roman v. Ashcroft*, 162 F. Supp. 2d 755, 760 (N.D. Ohio 2001); *see also* 1 Randy Hertz & James S. Liebman, *Federal Habeas Corpus Practice and Procedure* 31 n.26 (4th ed. 2001) (citing 1990 Report of the Subcommittee on the Role of Federal Courts finding that district courts hold hearings in 1.17% of all habeas corpus cases).[6]

As the court in *Qassim* concluded, applying these principles to similarly-situated persons, Petitioners' presence at the October 7 hearing is utterly unnecessary for the Court to address the legal question of whether the Government can be compelled to parole Guantanamo detainees who are treated as if they were no longer enemy combatants into the United States. *See Qassim*, 407 F. Supp. 2d at 201-02. Petitioners do not identify any factual questions that they claim are relevant to the present Motion for Procedures, let alone any that warrant being addressed at the October 7 hearing. That being the case, section 2243 provides no support for the present motion.

3. Aside from citing section 2243, petitioners generally rely on more pragmatic, though no less dubious, arguments for justifying the relief for which they move. According to Petitioners, their presence is necessary to "help the Court in addressing any logistical questions that arise from the various pending requests for parole and release, and [to] permit them an

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[6]*See also Robinson v. Henderson*, 316 F. Supp. 1241, 1242 (E.D. La. 1970) (noting that petitioner's presence is not need at a hearing where only legal are presented) (citations omitted). *Compare Walker v. Johnston*, 312 U.S. 275, 284 (1941) (agreeing that petitioner should attend hearing where an issue of fact is present) *with Hammond v. State of N.C.*, 227 F. Supp. 1, 3 (E.D.N.C. 1964) ("[T]he presence of the petitioner is not necessary . . . since [he] would add little, if anything, in the way of explanation of the facts involved.").

opportunity to respond to any points raised by the government." (Mot. ¶ 6.) Petitioners do not begin to explain how any logistical questions of the sort to which Petitioners might be alluding are relevant to the legal question facing the Court. They are not. Petitioners are certainly not in a position to assist their counsel in arguing a purely legal matter. Therefore, Petitioners are not entitled to an order requiring their participation in the October 7 hearing. *Cf. Minnec v. Hudspeth*, 123 F.2d 444, 445 (10th Cir. 1941) (holding that attendance of petitioner was unnecessary where he "could not testify concerning these matters because they are questions of law").

The other reason Petitioners give for their direct participation is to "provide [themselves with] crucial assurance . . . that there actually is a judicial process underway." (Mot. ¶ 7.) This is a flimsy justification that does not rise to Section 2243's fact-finding standard or otherwise justify granting this present motion. If Petitioners need assurances that their counsel are working on their behalf, they need only look to the body of work their counsel has produced. In any event, the notion that any such need should lead to the relief they ask of this Court is simply a non-sequitur.

While Petitioners' reasons for participating in the hearing are, to be understated, insubstantial, countervailing considerations are not. Allowing Petitioners into the United States would introduce a host of security and logistical problems that would be borne largely by the Government, and, presumably, by the Court. More fundamentally, granting Petitioners' request would cloud the clear legal and factual distinction between their present immigration status as inadmissible aliens not lawfully in the United States, *Shaughnessy*, 345 U.S. at 216, and their

desired status as detained aliens within the United States, *see, e.g., Clark v. Martinez*, 543 U.S. 371 (2005).

There is simply no basis for ordering the Government to parole detainees who are treated as if they were no longer enemy combatants into the United States while they await release, or for the other relief addressed in Petitioners' motion. *See Qassim*, 407 F. Supp. 2d at 202-03 (concluding that a habeas court does not have the power to order Guantanamo detainees released to the United States). At this juncture, it would be premature for the Court to adjudicate through a procedural motion the very issue on which it will hear legal arguments. As such, Petitioners' motion should be denied.

CONCLUSION

For the reasons discussed above, the Court should deny Petitioners' Joint Motion for Procedures to Govern October 7, 2008, Hearing.

Dated: September 24, 2008

Respectfully submitted,

GREGORY G. KATSAS
Assistant Attorney General

JOHN C. O'QUINN
Deputy Assistant Attorney General

/s/ Sean O'Donnell
JOSEPH H. HUNT (D.C. Bar No. 431134)
VINCENT M. GARVEY (D.C. Bar No. 127191)
JUDRY L. SUBAR
TERRY M. HENRY
ANDREW I. WARDEN
PAUL E. AHERN
SEAN W. O'DONNELL
Trial Attorneys
United States Department of Justice
Civil Division, Federal Programs Branch
20 Massachusetts Avenue, N.W.

Washington, DC 20530
Tel: (202) 514-3755
Fax: (202) 616-8470

Attorneys for Respondents

EXHIBIT F

Judge Ricardo M. Urbina's September 29, 2008 Minute Order

MINUTE ORDER denying (159) the Petitioners' Motion for Order for Procedures to Govern October 7, 2008 Hearing in case 1:05-cv-01509-UNA. 28 U.S.C. § 2243 requires the government to produce a person in its custody at a habeas hearing "[u]nless the application for the writ and return present only issues of law." Even assuming that § 2243 applies to detainees at Guantanamo and putting all security concerns and practical considerations aside, the petitioners fail to describe any outstanding factual issues related to the legality of their detention. Accordingly, the court denies their motion. SO ORDERED. Signed by Judge Ricardo M. Urbina on 9/29/08. Associated Cases: 1:05-cv-01509-UNA, 1:05-cv-01602-UNA, 1:05-cv-01704-UNA, 1:05-cv-02370-UNA, 1:05-cv-02398-UNA, 1:08-cv-01310-UNA (lcrmu2) (Entered: 09/29/2008)

EXHIBIT G

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

IN RE:	)	
	)	Misc. No. 08-CV-442 (TFH)
GUANTANAMO BAY	)	
DETAINEE LITIGATION	)	Civil Action Nos. 05-1509 (RMU)
	)	05-1602 (RMU)
	)	05-1704 (RMU)
	)	05-2370 (RMU)
	)	05-2398 (RMU)
	)	08-1310 (RMU)

NOTICE OF STATUS

By Minute Order dated August 21, 2008, respondents in the above-referenced matters were directed to notify the Court by September 30, 2008, of the status of petitioners. Previously, respondents informed the Court that they had determined that it would serve no useful purpose to engage in further litigation over enemy combatant status of petitioners Huzaifa Parhat (ISN 320), Abdul Semet (ISN 295), Jalal Jalaldin (ISN 285), Khalid Ali (ISN 280), and Sabir Osman (ISN 282). As respondents informed the Court, they decided to house those five petitioners as if they were no longer enemy combatants while efforts continue to resettle them in a foreign country. They would, after transfer to such special housing, remain there until they are resettled to another country, provided they comply with camp rules, regulations, and procedures. Respondents have now decided that the remaining twelve Uighur petitioners in these cases – Abdul Sabour (ISN 275), Abdul Nasser (ISN 278), Hammad Memet (ISN 328), Edham Mamet (ISN 102), Arkin Mahmud (ISN 103), Bahtiyar Mahnut (ISN 277), Ahmad Tourson (ISN 201), Abdur Razakah (ISN 219), Anwar Hassan (ISN 250), Dawut Abdurehim (ISN 289), Abdul Ghappar Abdul Rahman (ISN 281), Adel Noori (ISN 584) – will be put into the same category.

That is, they will be treated as if they are no longer enemy combatants.[1]

Dated: September 30, 2008

Respectfully submitted,

GREGORY G. KATSAS
Assistant Attorney General

JOHN C. O'QUINN
Deputy Assistant Attorney General

/S/ Andrew I. Warden
JOSEPH H. HUNT (D.C. Bar No. 431134)
VINCENT M. GARVEY (D.C. Bar No. 127191)
JUDRY L. SUBAR (D.C. Bar No. 347518)
TERRY M. HENRY
ANDREW I. WARDEN (IN Bar No. 23840-49)
Attorneys
United States Department of Justice
Civil Division, Federal Programs Branch
20 Massachusetts Ave., N.W.
Washington, DC 20530
Tel: (202) 616-5084
Fax: (202) 616-8470

Attorneys for Respondents

[1] As discussed with the Court at the hearing in this matter on August 21, 2008, this determination obviates the need to produce factual returns as to these petitioners. *See* Transcript of Hearing of August 21, 2008, at 51-52.

EXHIBIT H

UNITED STATES DISTRICT COURT

FOR THE DISTRICT OF COLUMBIA

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JAMAL KIYEMBA, ET AL Docket No. 05-1509
Petitioners,

v. Washington, D.C.
October 7, 2008
10:20 a.m.

GEORGE W. BUSH, ET AL
Respondents.

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MOTIONS/STATUS HEARING - UIGHURS CASES

BEFORE THE HONORABLE RICARDO M. URBINA
UNITED STATES DISTRICT JUDGE

APPEARANCES:

For the Petitioners: BINGHAM MCCUTCHEN, L.L.P.
By: Mr. P. Sabin Willett
Ms. Susan Baker Manning
150 Federal Street
Boston, MA 02110
617.951.8000
sabin.willett@bingham.com
susan.manning@bingham.com

LAW OFFICES OF ELIZABETH P. GILSON
By: Ms. Elizabeth P. Gilson
383 Orange Street
New Haven, Connecticut 06511

MILLER CHEVALIER
By: Mr. George M. Clarke, III
655 Fifteenth Street, N.W.
Suite 900
Washington, D.C. 20005
gclarke@milchev.com

BAKER & MCKENZIE, L.L.P.
By: Ms. Angela C. Vigil
Melon Financial Center
1111 Brickell Avenue, Suite 1700
Miami, Florida 33131
angela.c.vigil@bakernet.com

KRAMER LEVIN NAFTALIS & FRANKEL, LLP
By: Mr. Eric A. Tirschwell
Ms. Seema Saifee
Mr. Michael Sternhell
1177 Avenue of the Americas
New York, NY 10036
etirschwell@kramerlevin.com
ssaifee@kramerlevin.com

For the Respondent: United States Department of Justice
Civil Division, Federal Programs Branch
By: Mr. Judry Laeb Subar
Mr. Terry Marcus Henry
Mr. Sean W. O'Donnell, Jr.
Mr. Andrew I. Warden
Mr. David White
20 Massachusetts Avenue, N.W.
Room 5128
Washington, D.C. 20530
202.514.4107
judry.subar@usdoj.gov
terry.henry@usdoj.gov
sean.o'donnell@usdoj.gov
andrew.warden@usdoj.gov
david.white@usdoj.gov

U.S. Department of Justice
Civil Division, Deputy Assistant A.G.
By: Mr. John Caviness O'Quinn
Mr. Gregory Katsas
950 Pennsylvania Avenue, N.W.
Room 3137
Washington, D.C. 20530
202.514.2331
john.c.o'quinn@usdoj.gov
gregory.katsas@usdoj.gov

Court Reporter: Catalina Kerr, RPR
U.S. District Courthouse
Room 6716
Washington, D.C. 20001
202.354.3258

Proceedings recorded by mechanical stenography, transcript produced by computer.

P-R-O-C-E-E-D-I-N-G-S

(10:20 A.M.; OPEN COURT.)

THE COURT: Good morning, everyone. All right.

THE DEPUTY CLERK: Matter before the court, Civil Action No. 05-1509, Jamal Kiyemba, et al versus George W. Bush, et al.

Counsel, I ask you to approach the podium to address the Court, please. State your name for the Court and the reporter.

MR. WILLETT: Good morning, Your Honor. Sabin Willett of Bingham McCutchen with my colleagues, Elizabeth Gilson and the Kramer Levin firm, Miller Chevalier and Baker & McKenzie.

We are here this morning on motions for parole and for release, but we will be focusing on the parole motion.

These Guantanamo imprisonments are now, I think --

THE COURT: I think other counsel need to --

MR. WILLETT: I'm sorry, Your Honor.

THE COURT: -- introduce themselves as well. All right.

THE DEPUTY CLERK: We need all counsel to identify yourselves for the record and the reporter.

THE COURT: Even if by reference as was done by other counsel.

MR. O'QUINN: John O'Quinn for the Government, Your

Honor, and I'm joined at counsel table by the Assistant Attorney General for the Civil Division, Gregory Katsas, Mr. Terry Henry, Mr. Sean O'Donnell, Mr. Andrew Warden, Mr. Jud Subar and Mr. David White.

THE COURT: Thank you. Good morning. Good morning, everyone, ladies and gentlemen.

All right. Let me suggest to you how we're going to do things. I'm going to make some preliminary rulings that will put everyone on the same page as far as salient matters are concerned, and then I believe that counsel have provided more than ample briefings on the issues before the Court today.

If counsel really feel the strong need to iterate, and I don't mean reiterate what's already been stated in your very well prepared and generous submissions, if you feel the need to emphasize something once again, you'll have that opportunity briefly. I will make some more rulings, and if those rulings necessitate the calling of witnesses for more information relevant to the issues extent at that point, then we will call the witnesses.

First of all, let me say that the authorizations that have been submitted representing the authority of the Petitioners' counsel to act on their behalf are satisfactory. I accept them and I have examined them, particularly under the guidelines provided by *Adem versus Bush*.

Secondly, I'd like to confirm that the 17 Uighurs before the Court in this matter today have similar factual backgrounds, that is to say that the parties acknowledge that there are no material differences between the individual Petitioners that the Court should be made aware of at this time.

If the answer to that question is "yes," then the factual determination made by this circuit in *Parhat* will apply to all the Petitioners. Are we in agreement?

MR. WILLETT: Your Honor, we believe the Government has conceded that point.

THE COURT: All right. I know that as of September the 30th the remaining -- the Uighurs not previously recognized as non-enemy combatants have now been designated as non- -- or treated as non-enemy combatants; is that correct?

MR. O'QUINN: That's correct, Your Honor.

THE COURT: All right. So is my assumption correct?

MR. O'QUINN: Yes, Your Honor.

THE COURT: All right. Now, both sides have really done an excellent job in presenting their positions and explicating and explaining and interpreting the law and the policies that each side believes behooves this court to rule in a particular fashion.

I have reviewed not only what's been submitted, but I've also done additional research to assist the Court in

finding any other issues that might be salient and resolving the ones that have been squarely presented to the Court.

So, if either side would like to make additional arguments at this time, you may do that. I say briefly and I say please do not reiterate what's already been amply presented.

MR. WILLETT: Your Honor, Sabin Willett for the Petitioners. I am mindful, particularly from the transcript in August, that the Court had already explored these issues, so maybe what I should do is focus merely on what has happened since August. It is touched on in the briefs, but it might be well to emphasize it.

As we argued before, *Parhat* laid out three options for the Government: Release, transfer or re-C-cert. They waived one of them, and we argued that release must mean something different than transfer.

The Government disagreed. They went to the Circuit. They asked for reconsideration on that exact point. They said, "Please clarify that you didn't mean release into the United States." The motion was denied; the mandate issued.

So *Parhat* has been reinforced, and it says what it says about release in three separate places.

The second point is the one we just touched on, which is that on September 30th the Government conceded that everyone is in the same boat. It is well, I think, to

remember that many of these Petitioners have now been in this habeas case since July of 2005 and we only find ourselves at the merits point today because the Government asked for a stay.

It turns out that if they had made returns about who these people really are, they wouldn't have been within the habeas strip at all because they wouldn't have been properly designated as enemy combatants, so the men have already paid a three-year price for that stay, and that's why we think a remedy is so urgent today.

I think Your Honor has on board our points about how to read *Parhat*, and I think you have on board our arguments about the fact that we're not seeking an immigration remedy and our clients wouldn't obtain an immigration status by means of a parole remedy, but one point that came up late in the day perhaps bears emphasis, which is the suspension clause point.

The argument in *Boumediene* was there's an act of Congress and it bars habeas, happens to be called the DTA, and the Supreme Court said no. It's the same argument here, except it's a different set of acts of Congress. They say there's a group of immigration laws that would bar this remedy. There is no way around *Boumediene* from that position because it comes to the same thing.

They say those acts of Congress bar Your Honor from giving the judicial imperative of a remedy in a habeas case,

and so their immigration arguments, even if they were well taken on the statute, which we have argued the briefs they're not, would be barred by the suspension clause.

The last point to make also came out late, and that's because of the September 30th acknowledgment. Running through all of the legal arguments has always been this undertow of, "Well, they're really bad guys. Trust us on this, Judge. Yes, we haven't charged them with a crime for six years, and yes, we won't -- we'll plead no contest to their statuses as noncombatants. Yes, we're telling all of our allies all across the world that they should take them, but whisper, whisper, they're really bad guys."

And we've always been willing to confront that whispering campaign and the Government has barred us from doing that by having them not here. So, today is no day for the Government to be trying to create a new theory of detention.

I think, from Your Honor's opening remarks, that now is not the moment to get into the practical solution. We do have a proffer and we have witnesses available for ample questioning, but I think you don't want us to get there yet, so I'll reserve that for later and leave with you, if I may, Your Honor, with two thoughts, which is that this case, Kiyemba, is of a piece with all the other Guantanamo cases since 2002.

It represents a narrow vision of what the judicial branch is, a vision that has continually been rejected by the courts of appeals and the Supreme Court in *Rasul,* in *Hamdi* and *Hamdan,* in *Boumediene* and *Parhat* itself. The courts above have reinforced the notion that this is the place where cases and controversies are resolved, that courts can give real remedies, and the Government, even to this day, takes a position that would essentially say that no judge in this building can resolve any Guantanamo case.

And what I mean by that is, there's only two places to go from Guantanamo. You can come here or you can go somewhere else in the world, but somewhere else in the world requires the cooperation of a foreign sovereign, and Your Honor cannot order the King of Saudi Arabia or the President of France to accept a prisoner, so the only unilateral order that judiciary can give is the kind of order we seek in this case and the Government says you can't do that.

So, the Government, what they're really saying is, there's no relief any court can give in any of these cases, and we think that's wrong.

You've heard us at great length on the problem of delay and the price paid by our clients for it. I would suggest that if, hypothetically, Your Honor's order were to continue this hearing for 30 days but order that Mr. O'Quinn and I spend that 30 days in Guantanamo, people would think

that a harsh order, but neither Mr. O'Quinn nor I has a greater claim on freedom than these men in light of the Government's concession, and so delay is a price every bit a shock for them as it would be for us in that hypothetical and a price that the Supreme Court said in *Boumediene* must not fall any longer on them.

That's why we ask so urgently for the remedy today and why we are prepared to show you in practical terms how that can be made real from and after this afternoon.

Thank you, Your Honor.

THE COURT: Thank you.

MR. O'QUINN: Thank you, Judge Urbina. As the Government acknowledged at the outset, the Department of Defense has determined that it no longer makes sense to contest the enemy combatant status of these 17 Petitioners and that they should be free to go.

The issue is that they have nowhere to go. Now, the United States Government is not actually preventing them from leaving Guantanamo Bay in the sense that if there were a willing country -- if there were a country willing to accept them, they would be free to go. It's the fact that there is no willing country and their own home country is one that U.S. policy prevents us from returning them to force -- forcibly because of humanitarian concerns.

The United States is actively and diligently seeking

to find a country where they can be repatriated, but in the meantime, they are being treated as non-enemy combatants and they've been given living conditions consistent with that treatment.

However, these 17 Petitioners seek what is an unprecedented remedy in having this court order the Government to bring them into the United States to release or parole them where some of them would hope to settle here in the Washington, D.C. area. Now, this was the same issue that was presented to the Court in *Qassim*.

THE COURT: What would you say is the difference between release and parole?

MR. O'QUINN: Well, in this context, Judge Urbina, I'm not sure that there is one. These are terms of art that the Petitioners are using because habeas cases recognize that when you have someone who is in the United States and you don't have any of the immigration or the sovereignty issues implicated, that parole is a lesser included -- a lesser included right that a court may grant, but it presupposes that there's the greater right, which the right ultimately of release.

On the habeas cases that they rely on, all involve persons who were indisputably within the United States where the issues of sovereignty that are presented in this case are simply -- were simply not at issue, not implicated.

This court, as the Supreme Court has made consistently clear in cases like the *Mezei* case in particular, *Mezei versus Shaughnessy, Landon versus Plasencia,* that this court may no more order the United States to bring a person into this country than it could order a foreign country to accept a person. The issue of entry into the United States is one of sovereign prerogative, and so the question that this case presents is really where does the *Boumediene* decision end.

THE COURT: Do you believe that? Do you really believe that this court's authority to order a person into the United States by a United States court is equivalent to this court's authority to order an individual in detention into another country and order another country and another sovereignty to accept that? You really believe that?

MR. O'QUINN: That certainly appeared to be the implication of the Supreme Court's decision in *Mezei*. I mean, the question that this case really presents is where does the right in *Boumediene* end and where do the limitations on the Court's authority, as recognized in *Mezei*, begin?

Mezei is directly analogous here where you have a person who actually had lived in the United States for many years, had a much greater claim for entry into the United States but they were not -- they were not a citizen. They had left the country, and when they attempted to return to the

country, they were inadmissible aliens and they were not admitted into the United States, and they were also not able to return to the countries from which -- from which they came, made several attempts to return to other countries. The Supreme Court recognized that habeas jurisdiction lied and then was presented with the question of whether or not this individual must be released into the country.

The Court concluded the answer to that question was no, even though it recognized that that worked a hardship, and the Government recognizes the current situation works a hardship, and we are actively seeking to find a country that will accept them for repatriation, but that was the consequence in *Mezei* where there was a hardship because the political branches had not deemed to admit the person into the country and there was no country from which they could return.

And I think in this context the Court should be particularly mindful of the consequences of ordering release into this country of someone who had been captured as a suspected enemy combatant. These Petitioners were captured near Tora Bora in late 2001 when the United States military was hunting for Osama bin Laden in the same area. Their capture was consistent with the laws of war, and I don't think anybody can reasonably dispute that it was sound and responsible for our troops on the ground to make the command decision to take them into custody at that time.

For the Court now to say that such individuals, individuals who have received paramilitary training on AK-47, Kalashnikov assault rifles, to be released into the United States because their original basis for detention is one the Government is no longer contesting would fundamentally alter and frankly chill the effective waging of war by the Executive because of the consequence --

THE COURT: The Government has already determined clearly, however, that these detainees were not waging war on the United States, have never waged war on the United States, were not training to wage war on the United States, and to date, I believe the Government has conceded that these people are not a security risk or a danger to the United States; isn't that right?

MR. O'QUINN: That's not quite right, Judge Urbina, in the sense that the United States is not contesting the determination of enemy combatancy. That's another way of saying that the United States presented evidence to the D.C. Circuit to show that Petitioner Parhat was an enemy combatant. The D.C. Circuit said that that evidence was --

THE COURT: D.C. Circuit said that the information the Government was relying on was unreliable and that it could not constitute a basis for concluding that he was an enemy combatant even though the CSRT said he was.

MR. O'QUINN: The D.C. Circuit said that the

Government's evidence that had been presented was insufficient. Because the Government had already determined, separate and apart from that, that it would not be a risk to United States security to release them to a foreign country --

THE COURT: What is the risk to -- the security risk to the United States? What page is that on? What is the security risk to the United States should these people be permitted to live here? What is it? You've had seven years to study this issue. What is the security risk?

MR. O'QUINN: Judge Urbina, these individuals would be inadmissible aliens as under the terrorism --

THE COURT: I'm not talking about status. I'm talking about what is the security risk. What is the risk to national security if these individuals were admitted? Forget about the legal --

MR. O'QUINN: Congress has made the determination, Judge Urbina, that people who received military type training that they received in order to commit insurrection and to take up arms against another country, whether it's the United States or whether it's any other country, are inadmissible aliens because they are a security risk to this country. Congress has made that determination.

They squarely fall into that category. It is undisputed that Petitioner Parhat, for example, undertook weapons training at this camp, whether he was affiliated with

ETIM formally or whether it was any other organization.

THE COURT: Is there any evidence that he was affiliated with ETIM?

MR. O'QUINN: Judge Urbina, there is evidence about him being affiliated with ETIM based on who was running the camp at which he participated, but in terms of inadmissibility into the United States, it's really beside the point of whether or not he was part of ETIM or whether it was part of two or more, whether or not organized.

I'm quoting from the immigration law now: Whether or not organized, who engaged in terrorist activities, and terrorist activities include the plan to commit terrorist activities and that includes the use of firearms for purposes other than personal gain, and in their own testimony, in C-cert proceedings, certainly demonstrates that would be an issue with respect to Petitioners.

The issue before the D.C. Circuit in *Parhat* was not whether or not they would be a danger to the United States or a danger to any particular person in the United States if they were admitted into the country. The limited question before the D.C. Circuit is whether or not they were enemy combatants, which is a much narrower category than whether or not somebody is a terrorist, whether or not they are dangerous, whether or not they should be set free into American society.

THE COURT: So your answer is these -- these Uighurs

are a risk to national security because Congress says so.

MR. O'QUINN: My answer, Judge Urbina, without offering any -- you know, I don't have available to me today any particular specific analysis as to what the threats of -- from a particular individual might be if a particular individual were let loose on the street.

What I do have is Congress' determination, the people who received the training that they received should not be admitted to the United States under all our -- would be ineligible for asylum in the United States. That's Congress' determination, and you're in an area where the Supreme Court has made repeated -- has repeatedly made clear that these are questions that are for the political branches.

All right. I get the thrust of that argument. Move on to your next argument, please, or your next point.

MR. O'QUINN: Judge Urbina, my next point, just to respond to a couple of the points that my colleague made. The D.C. Circuit's decision in *Parhat* does not resolve the issue of release into the United States, and indeed, several of the follow-up cases, there were four other -- there were four other cases involving four of these Petitioners in which the United States agreed to the entry of the same judgment that was entered in *Parhat*, the panel made very clear that the court there was not deciding the issue of what country these persons may be released to.

So that the notion that the D.C. Circuit has already decided that they may be released into the United States, despite the Supreme Court's decision in *Mezei,* despite the long line of Supreme Court cases and D.C. Circuit cases, cases like *Bruno versus Albright* in which the D.C. Circuit made very clear that the issue of entry of somebody into the country is one for the political branches, in the face of all of that, the D.C. Circuit didn't in *sub selentio* and *Parhat* rule they could be admitted into the United States.

And the court in *Boumediene* itself doesn't purport to resolve that issue. *Boumediene* makes clear and *Munaf,* decided unanimously on the same day, make abundantly clear that just because a habeas jurisdiction lies doesn't mean that there will always be a remedy of release available. *Munaf* could not be any clearer on that point, recognizing for reasons of comity, in this context reasons of separation of powers, that the remedy of release may not be appropriate in all cases, and this is certainly one of those cases.

THE COURT: Shouldn't those cases be read to mean that release is not always appropriate because, for example, there may be the convening of another CSRT hearing or there may be a retrial or there may be some other circumstance that would militate against the release because further government action is contemplated?

MR. O'QUINN: Judge Urbina, I don't think so because

in *Boumediene* itself, the Court separately referred to the idea of conditional release. But even if that's what *Boumediene* meant when it said that release might not always be available, you can't avoid what the Supreme Court said in *Munaf*. It's -- it is particularly clear in *Munaf* where it says habeas corpus is governed by equitable principles and the Supreme Court has recognized that prudential concerns such as comity may require a federal court to forego the exercise of its habeas power.

So, even if the Court concluded that it had power here, and we would say that *Mezei* demonstrates that the Court simply does not have the power here to order release into the United States, but even if the Court concluded that it did have such power, for the same reasons that Judge Robertson recognized in *Qassim*, this court should forego the exercise of that power.

And let me just turn to --

THE COURT: Of course, Judge Robertson decided *Qassim* before *Parhat* and before *Boumediene* and before the guidance of those cases were provided by our circuit and the Supreme Court.

MR. O'QUINN: That's correct, Your Honor. And in fact, the point that I was next going to make is that nothing -- no intervening decision changes the rationale or the result that should -- that should come from Judge

Robertson's decision. And what I mean by that is if you look at what happened between *Qassim* and today, Congress enacted the Military Commission's Act that removed habeas jurisdiction from Guantanamo Bay.

Now, at the time *Qassim* was decided, the Supreme Court had decided *Rasul*. It predated the decision by Congress to enact the MCA, and so the situation then was exactly the same as the situation today in terms of Supreme Court precedent. That is, the writ ran to Guantanamo Bay and Judge Robertson was faced with exactly the question that the Court is faced with. The MCA was then adopted. *Boumediene* simply restored the status quo ante in terms of finding that the jurisdiction strip was invalid as applied to Petitioners at Guantanamo Bay seeking to challenge their status as enemy combatants.

So, there's nothing about the intervening Supreme Court decision in *Boumediene* that makes any difference whatsoever in terms of affecting or upsetting Judge Robertson's analysis in *Qassim*.

And the same is true of the *Parhat* decision. Again, *Parhat* turned on the fact that the D.C. Circuit concluded that the evidence that the Government had presented was insufficient to show not that petitioner wasn't a member of ETIM, not that petitioner wasn't potentially dangerous if released into the United States, but -- and not that

petitioner wasn't a threat potentially to other countries such as China, and I'll come back to that point in a moment, but simply that the Government had not provided sufficient evidence -- sufficient reliable evidence to show that ETIM was affiliated with al Qaida and thus didn't satisfy the requirement for enemy combatancy, a very narrow and limited question as compared to the question of whether or not there would be any security risks from releasing a person into this country from Guantanamo Bay.

And that brings me back to one of the points that Judge Robertson made in *Qassim*. One of the points that he recognized --

THE COURT: Well, let's not forget that Judge Robertson also concluded that the detention was illegal.

MR. O'QUINN: Well, he did --

THE COURT: Yes, he did decide it was an illegal detention. He said regrettably he did not want to interfere with the functions usually delegated the Executive Branch at that time.

MR. O'QUINN: Well, I think he actually concluded that he could not interfere with the functions that the Constitution gives to the Executive Branch and the Legislative Branch.

I know that Judge Robertson found the detention was unlawful, and with all due respect, I would have to disagree

for the reasons that the Supreme Court set forth in *Mezei*.

Because if the detention -- if the detention for persons who were captured at Tora Bora at a time and a place and under circumstances where there was every reason to believe that there were enemy combatants, and if subsequently the Government determines that it's not proper to hold them as enemy combatants but there's nowhere to release them to in terms of you can't send them back to their home country and no third country is willing to accept them, we would submit that that falls within the Government's authority to orderly wind-up detention, but whether you agree with that or not, it's exactly like the situation -- we now find ourselves exactly in the situation that the Supreme Court confronted in *Mezei*.

THE COURT: Well, let's talk about *Mezei*. *Mezei* concerned an alien permanently excluded from the United States on security grounds but stranded on Ellis Island because other countries would not take him back. The Government, in that case, would not disclose to the district court the evidence by which it determined the Petitioner to be a threat to the public interest and the court.

The court, in turn, determined that the detention -- that detention longer than 21 months was excessive. That's what the court said. The court then directed the petitioner's conditional parole on bond and the Supreme Court in a 5-4

decision back in 1953, I think it was when this case was decided, deemed the petitioner's detention on Ellis Island the equivalent of being stopped at the border.

It held that times being what they are, that's a quote, and whatever or individual estimate of Congress' policy to exclude without hearing aliens who pose a threat to the public, and the fears on which it rests, the petitioner's right to enter the United States depends on the congressional will and courts cannot substitute their judgment for the legislative mandate.

Commenting further on *Mezei*, to the extent that *Mezei* held that indefinite detention of excludable aliens is constitutionally permissible, there have been a number of decisions that dispute that and question it. The Sixth Circuit surmised that that conclusion has been fatally undermined by the court's later decisions, and I think we can all cite additional decisions that may undermine it.

The facts in that case, of course, were quite different than the ones that we're looking at here. I don't think that that case is on all fours with this case. But in any event, proceed.

MR. O'QUINN: Well, Judge Urbina, you're right, there were some significant differences in the facts.

THE COURT: There were two cases, in particular, that created -- that had created a distinction. One is called

Zadvydas, right, and the other is *Clark versus Martinez.*

MR. O'QUINN: Well, Judge Urbina, *Zadvydas* and *Clark* do not in any way upset the Supreme Court's decision in *Mezei.* *Zadvydas* involved persons who were within the United States and were being -- who had been admitted to the United States. They were admitted aliens who, as *Zadvydas* recognized, there is a strong current that runs through Supreme Court precedent that there is a fundamental distinction between aliens who are in the United States and aliens who are not in the United States, and *Zadvydas* seized upon that distinction, used it to engage in not in a constitutional holding but in constitutional avoidance to construe the statute to find that for somebody who was being removed from the United States, the Attorney General could only hold them -- it was then the Attorney General, now the Secretary of Homeland Security -- can only hold them for six months absent a showing that they were reasonably likely to be removed in the near future.

That's fundamentally different because it involves people who had effected an entry into the United States. *Clark versus Martinez* did not extend that holding because the Court suggested that the constitutional avoidance issues presented in *Zadvydas* applied to admissible aliens. In fact, Justice Scalia's opinion for the majority there specifically said that that wasn't the basis for the decision at all.

The basis for the decision in *Clark* was the fact

that because the Court had construed the statute -- the removal statute a particular way in *Zadvydas* in order to avoid any potential constitutional implications for persons who had been admitted into the United Stated and had full due process rights, that because the Court had construed the statute a certain way as to them, the Court had to apply the same statutory language, the same statute to all aliens who were covered by the statute the same way.

I think it's very important to note, as Justice Kennedy's dissent in *Zadvydas* does, what the Supreme Court in *Zadvydas* specifically distinguished the *Mezei* case recognizing that there was a fundamental difference between aliens who are inside the United States and aliens who are outside the United States.

And the fact that habeas corpus runs to Guantanamo Bay doesn't change that analysis because habeas corpus ran to Ellis Island where the petitioner in *Mezei* was located. So neither *Zadvydas* nor *Clark versus Martinez* in any way upset the holding in *Mezei*, and frankly, even if they do cast potential doubt on it, the Supreme Court in *Agostin versus Felton* has instructed the courts of appeals and the district court that if a precedent of this court has direct application in a case yet appears to rest on a reason rejected in some other line of decisions, the court of appeals should follow the case which directly controls leaving to this court the

prerogative of overruling its own decisions.

So, whether or not the Sixth Circuit thinks that *Mezei* is still good law, it is still the binding precedent unless and until the Supreme Court itself decides to overrule it. And the reasons for that are exactly the reasons the judge -- that Judge Robertson recognized in *Qassim,* which is that an order requiring release into the United States, even into some kind of parole bubble, some legal fictitional status in which they would be here but would not have been admitted, would have national security and diplomatic implications beyond the competence or authority of this court.

And while I'm not in a position to talk about specific issues of national security, certainly there would be concerns about our relationship, for example, with other countries, say, for example, China, if the Court put the Government in a position of not being able to speak with one voice, and that's something that the *Munaf* decision harkens back to.

In these issues where you potentially -- where courts are potentially treading in the areas that the Constitution commits to the political branches, that you have to be particularly circumspect because of the potential for interference with foreign relations and with diplomacy, needless to say, and I can't speak to with any specificity in this setting, but the Court's aware of what we provided in our

classified declarations and there certainly would be concerns that would be implicated were the Court to undermine the ability of the Government to speak with one voice in regard to its determination on whether or not to release or admit somebody into the United States itself.

If the Court has no further questions.

THE COURT: I think you covered them all. Thank you, sir.

MR. O'QUINN: Thank you.

THE COURT: All right. You may have a brief moment in rebuttal.

MR. WILLETT: Your Honor, I think one of the particular benefits of the parole remedy here is that there will be conditions, and parole is something you can revoke, so if any of these concerns of Mr. O'Quinn actually were realized in some way or threatened to be realized, that can be protected against through monitoring, through reporting, through conditions as to where people travel and the kinds of things that the Court's familiar with.

Mezei is a volunteer. He comes to the border. Our clients are bought for bounties, they're shackled, they're put on a plane, they're brought to Guantanamo in chains. They are brought here. This is a problem that the Government's making, and they are brought to a place where the Supreme Court says the constitutional privilege of habeas corpus runs, and then

it says the alternative scheme Congress gave was inadequate because it didn't provide for release.

And then *Parhat*. I still don't follow the Government's argument on *Parhat*. *Parhat* orders them to release or transfer, and whatever we think that means, we can all agree four months later they haven't done either one. It's an order. It's final. It hasn't been stayed by anybody, so in one sense all we're doing in this habeas case is carrying out an order that was given by the Circuit in the only way that's available to us; in fact, the most limited way that's available to us through parole.

I'd never heard anyone suggest before that our relationships with other nations are a lawful basis to hold somebody in a prison. I mean, we release people all the time from Sri Lanka, from Vietnam, from Cuba in the cases cited in the papers. All of them actually did present some real risk, and the district judges said, we read *Clark*, there's no basis for the detention.

Thank you, Your Honor.

THE COURT: After detaining 17 Uighurs in Guantanamo Bay, Cuba for almost seven years, free until recently from judicial oversight, I think the moment has arrived for the Court to shine the light -- shine the constitutional -- the light of constitutionality on the reasons for that detention past and prospective in determining whether the detention is

itself legal and in further determining what if any remedy the Court is empowered to apply.

Indeed, our circuit has examined this situation through the lenses provided in the *Parhat* case and has determined that in that particular instance there was a lack of sufficient indicia of reliability to support a finding made by a military court with respect to that individual's status as an enemy combatant.

After reviewing this circuit's decision in *Parhat versus Gates,* the Government concluded that it no longer considered the 17 Uighur detainees enemy combatants. In light of these developments and the Supreme Court's recent rulings in *Boumediene versus Bush,* restoring the Court's jurisdiction over detainees' habeas corpus petitions, the detainees filed motions alleging that their continued detention is unlawful and requesting that the Court order the Government to release them into the United States.

Because the Constitution prohibits indefinite detention without cause, the Government -- the Government's continued detention of Petitioners is unlawful. Furthermore, because of separation-of-powers concerns do not trump the very principle upon which this nation was founded, the unalienable right to liberty, the Court orders the Government to release the Petitioners into the United States.

Congress passed the Authorization for use of

Military Force authorizing the President to use all necessary and appropriate force against those nations, organizations, or persons he determined planned, authorized, committed or aided the terrorist attacks that occurred on September 11, 2001, or harbored such organizations or persons in order to prevent any future acts of intentional terrorism against the United States by such nations, organizations or persons.

As the Supreme Court found in *Hamdi versus Rumsfeld* and again in *Boumediene versus Bush,* inclusive in this grant is the authority to detain individuals who fought against the United States in Afghanistan for the duration of that particular conflict. The Deputy Secretary of Defense issued an order on July the 7th, 2004 setting forth an enemy combatant standard to assist military tribunals in deciding whether to detain someone caught in the theater of war.

This standard defines an enemy combatant as, quote, an individual who was part or supporting -- part of or supporting Taliban or al Qaida forces or associated forces that are engaged in hostilities against the United States or its coalition partners. Thus far, this standard is the only one recognized by the Supreme Court for legally detaining individuals under the Authorization For Use of Military Force Act.

In this case, the Government has already absolved the Petitioners of their enemy combatant title; that is to

say, they have indicated that none of these 17 are to be treated as enemy combatants, so its theory for continued detention is based on an inherent Executive authority to quote/unquote wind-up detentions in an orderly fashion.

Initially, the Petitioners' protest that this wind-up authority should -- should it exist, would not apply to them because they were never lawfully detained in the first instance, but in *Boumediene*, the Supreme Court made it clear that habeas is not available the moment a person is taken into custody, and in any event, the record is too undeveloped as to the circumstances regarding their transfer from Pakistan officials to U.S. custody to make that determination.

As stated in *Qassim versus Bush* by a judge in this court, my esteemed colleague and friend, Judge Robertson, the Government's use of the "Kafkaesque" term should no longer -- the term being "no longer enemy combatants," deliberately begs the question whether these Petitioners ever were enemy combatants.

Accordingly, the Court assumes, for the sake of this discussion, that the Petitioners were lawfully detained and that the Executive does have some inherent authority to wind up wartime detentions. The parties bicker over how long the Executive may detain individuals pursuant to its wind-up authority.

The Petitioners contend that the Government

determined long ago that it cannot effect transfer, and after five years of failed efforts, any wind-up authority has been used up. The Government recites examples of past wars in which the United States has detained prisoners of war for several years after the ending of hostilities, noting that thousands of Iraqis held after the Gulf War, the hundred thousand -- hundred thousand Chinese and Korean prisoners of war detained at the end of the Korean War and thousands of prisoners of war at the end of World War II who did not want to repatriate.

The Government then concludes that because it determined only days ago to forego its option of attempting to conduct a new combat status review tribunal, that the continued detention is constitutional.

The court in *Qassim* informed its decision on this point by looking to analogous immigrant statutes. Citing the Supreme Court cases of *Zadvydas versus Davis* and *Clark versus Martinez*, the *Qassim* court observed that the presumptive limit to detain an inadmissible or removable alien is six months. The Court concluded that the Government's nine-month detention of the Petitioners after determining that the Petitioners were no longer an enemy combatant was unlawful.

Zadvydas and *Clark* cases, however, are not strictly analogous to the present inquiry. Both *Zadvydas* and *Clark* interpret an immigration statute as authorizing the Government

to detain aliens for six months, a presumptively reasonable period.

The Court chose to not read the statute to authorize indefinite detention because such a reading would approach constitutional limits. In these constitutional limits, we find the resolution of the issue before the Court. It is these constitutional limits that are at issue in this case.

The Government argues that the Supreme Court case of *Shaughnessy versus United States ex rel. Mezei,* M-e-z-e-i, provides a better read on the constitutional limits to detention than either the *Zadvydas* or *Clark* case.

At the Court -- as the Court has stated, the *Mezei* case concerns an alien immigrant permanently excluded from the United States on security grounds but stranded in his temporary haven on Ellis Island because other countries will not take him back. The Government would not disclose to the courts the evidence by which it considered the petitioner to be a threat to the public interest; nevertheless, the Supreme Court, in a 5-4 decision, deemed the petitioner's detention on Ellis Island the equivalent of being stopped at the border.

It held that times being what they are, at that time the Cold War -- I believe the issue was whether he was a Communist -- and whatever our individual estimate of Congress' policy to exclude aliens who pose a threat without holding a hearing and the fears on which it rests, the petitioner's

right to enter the United States depends on congressional will and the courts cannot substitute their judgment for the legislative mandate, close quotes.

The Court disagrees with the Government's assertion that the logic of *Mezei* and that decision applies with even greater force to this case. The opening sentence of *Mezei* -- of the *Mezei* decision, noting that the petitioner is stranded in his temporary haven, indicates that the court was not intending to tackle the constitutionality of indefinite detention. To the extent that *Mezei* and the court did make a determination as to indefinite detention, it has either been distinguished or ignored by subsequent courts.

For example, the Sixth Circuit in *Rosales-Garcia versus Holland* observed that the Court's conclusion in *Mezei* regarding the indefinite detention at issue has been undermined by post-*Mezei* cases that regard indefinite detention as raising constitutional concerns.

Furthermore, the *Clark* court did not bother distinguishing its holding from the holding in *Mezei* and *Zadvydas*, and the *Zadvydas* court explained that the cases differed in that the alien in Mezei was stopped at the border seeking re-entry, whereas the alien in Zadvydas was already inside the United States.

Additionally, a couple of very important distinctions exist between *Mezei* and this case. First, the

Mezei court was unaware of what evidence, if any, existed against the petitioner. And because the Court accepted the Government's unsupported allegations as true, the *Mezei* court and its determination regarding continued detention is categorically different from the determination facing this court.

Here, pursuant to the Detainee Treatment Act and *Boumediene,* the Government represented evidence justifying its detention of the petitioners but failed to meet its burden.

Secondly, *Mezei,* the petitioner, unlike the current Petitioners, came voluntarily to the United States seeking admission. Drawing primarily from the principles espoused in *Clark* and *Zadvydas,* those cases, the Court concludes that the constitutional authority to wind-up detentions during wartime ceases once, one, detention becomes effectively indefinite; and two, it is a reasonable certainty that the petitioner will not return to the battlefield to fight against the United States; and three, an alternative legal justification has not been provided for continued detention. Once these elements are met, further detention is unconstitutional.

First, in determining whether the detention has become effectively indefinite, the Court considers what efforts have been made to secure release for the Petitioners and then uses that to evaluate the likelihood that these efforts or any supplemental efforts will be successful in the

future.

Looking back, the Government had already cleared 10 of the Petitioners for release by then and by the end of 2003. The Government cleared an additional five Uighurs for release or transfer in 2005; one of the -- one for transfer in 2006 and one for transfer in May of this year.

Throughout this period, the Government has been engaged in quote/unquote, extensive diplomatic efforts, close quote, to resettle the Petitioners.

Accordingly, the Government cannot provide a date by which it anticipates release or transferring the Petitioners, and their detention has become -- accordingly, has become effectively indefinite.

The second element has also been satisfied by the Circuit's decision in *Parhat versus Gates*. The Circuit observed that it is undisputed that the petitioner is not a member of al Qaida or the Taliban and that he has never participated in any hostile action against the United States or its allies, thus dispelling any concerns that the Petitioners would return to the field of battle.

Finally, as to the last element, the Government acknowledges that it is -- that it no longer considers the Petitioners to be enemy combatants and it has only presented one alternative theory for detaining the Petitioners, its wind-up authority. Accordingly, this element has not been --

this element has been satisfied as well.

The Court's authority to order the release of an alien unlawfully detained into the United States has not been directly addressed by any court. The Supreme Court's most recent pronouncement in *Boumediene* regarding Guantanamo detainees assured them certain procedural guarantees but hedged when discussing remedy.

The Court qualified that release need not be the exclusive remedy and is not the appropriate remedy in every case in which the writ is granted. In *Hamdi,* the Court concluded that absent a suspension of the writ by Congress, a citizen detained as an enemy combatant is entitled to this process, to make his way to court with a challenge to the factual basis for his detention by his government.

Under its broad constitutional authority, Congress has authorized the Secretary of Homeland Security to parole and/or admit aliens into the United States. It is undisputed that he has not acted in this authority -- on this authority with respect to the Petitioners in this case.

Normally, the discussion would end here and the Court would have no reason to insinuate itself into a field normally dominated by the political branches; however, the circumstances now pending before the Court are exceptional. The Government captured the Petitioners and transported them to a detention facility where they will remain indefinitely.

The Government has not charged these petitioners with a crime and has presented no reliable evidence that they would pose a threat to U.S. interests. Moreover, the Government has stymied its own efforts to resettle the Petitioners by insisting, until recently, that they were enemy combatants, the same designation given to terrorists willing to detonate themselves amongst crowds of civilians.

The Petitioners' request that the Court order their release into the United States is not a simple one. It strikes at the heart of our constitutional structure, raising serious separation-of-powers concerns.

The Petitioners argue that the Circuit's *Parhat* decision resolved any separation of powers issue when it ordered the Government to release a Uighur Petitioner well aware of the fact that release could only mean release into the United States.

The Government counters that the Circuit explicitly reserved judgment as to whether it even had the authority to release the Petitioner under the DTA and filed a motion with the Circuit requesting clarification of its order. The Petitioners' retort that the Circuit's denial of the Government's request for clarification, quote, resolved the question of whether it may order release pursuant to the DTA.

As stated at the outset of this opinion, the Court's focus is on assessing the validity of the final decision of a

CSRT. The Circuit holds that the evidence was insufficient to support the CSRT's determination and explicitly reserves judgment as to whether the DTA grants the Circuit authority to release detainees.

And the Circuit noted in a recent order explaining the *Parhat* decision to four other Uighur detainees, quote, no issue regarding the places to which these Petitioners may be released is before this panel. But, in the *Parhat* decision, the Circuit also explicitly directs the Government, quote, to release or to transfer the petitioner, or to expeditiously hold a new CSRT consistent with this opinion, and declares that there is no question but that the district court will have the power to order Parhat released, close quotes.

Regardless of whether these statements arose by fit of aspiration or simple inadvertence, the Circuit's message is muddied. As this circuit noted in *Department of Labor versus Insurance Company of North America,* it is not for this court to clarify the Circuit's intent to read into the language reasoning and explanation that are simply not there.

Thus, the Court does not consider the Circuit's *Parhat* decision to have resolved this court's authority to order the Petitioners released into the United States. The Government proposes that this court follow the holding reached by a fellow district judge in *Qassim versus Bush.*

In assessing the weight to be accorded *Qassim,* the

Court notes the legal landscape has changed since *Qassim* was issued in 2005. In June of this year, the Supreme Court handed down its *Boumediene* decision unequivocally extending to Guantanamo detainees the constitutional right to habeas corpus, and in the process, the Court re-emphasized the importance of the writ in preserving liberty.

The Court succinctly states that the writ must be effective. Additionally, this court's decision -- this Circuit's decision in *Parhat* observed that it is undisputed that a Uighur detainee is not a member of al Qaida or the Taliban and that he has never participated in any hostile actions against the United States or its allies.

In addition to not having the benefit of these recent cases, the case law cited in *Qassim* is not entirely supportive of the absolute deference the Court affords the political branches or that the Court is urged to afford the political branches. The *Qassim* court initially proffers a sound proposition, quote, a strong and consistent current runs through immigration/alien exclusion cases that respect -- and respects and differs -- defers, excuse me -- that respects and defers to the special province of the political branches, particularly the Executive, with regard to the admission or removal of aliens, close quotes.

But then the Court extends this deference to circumstances, including indefinite detention without cause.

Such absolute deference cannot bear the weight of case law. As cases cited in *Qassim* recognize, the power to exclude or expel aliens is vested in the political branches, except so far as the judicial department is authorized by treaty or statute, or is required by the Constitution to intervene.

Boumediene -- the *Boumediene* court noted that these qualifications are important, indeed essential to preserving habeas corpus; it says, quote, an indispensable mechanism for monitoring the separation of powers, speaking of habeas corpus. The judicial authority to consider habeas petitions is derived from the guiding principle that personal liberty is secured by adherence to separate powers -- excuse me -- by adherence to separation of powers. And the Supreme Court further determined in *Immigration & Naturalization Service versus St. Cyr,* C-y-r, that the court's authority to safeguard an individual's liberty from unbridled executive fiat reaches its zenith when the Executive brings an individual involuntarily within the court's jurisdiction, detains that individual and then subverts diplomatic efforts to secure alternative channels for release.

Liberty finds its liberator in the great writ, and the great writ, in turn, finds protection under the Constitution.

The political branches may not simply dispense with these protections, thereby limiting the scope of habeas review

by asserting that they are using their best efforts to resettle the Petitioners in another country. These efforts have failed for the last four years and have no foreseeable date by which they may succeed.

As the court in *Boumediene* recognize, to accede to such manipulation would grant the political branches, quote, the power to switch the Constitution on or off at will, close quotes.

This, quote, will permit a striking anomaly in our tripartite system of government, leading to a regime in which Congress and the President, not this court, speaking of the Supreme Court, say what the law is. Clearly, each branch has its own function: The Executive Branch to enforce the law, the Legislative Branch to write the law, and the Judicial Branch to interpret the law.

Thus, the unilateral carte blanche authority the political branches purportedly wield over the Uighurs is not in keeping with our system of governance. As the Court in *Hamdi* held, quote, whatever power the United States Constitution envisions for the Executive in its exchanges with other nations or with enemy organizations in times of conflict, it's -- it most assuredly envisions a role for all three branches when individual liberties are at stake, close quote.

Accordingly, because the Petitioners' detention has

already crossed the constitutional threshold into infinitum and because our system of checks and balances is designed to preserve the fundamental right of liberty, the Court grants the Petitioners' motion for release into the United States.

A formal opinion will follow which further elaborates on the points made during this summary explanation of the Court's decision.

Therefore, the Petitioners' motion for release into the United States is granted, and the motion for immediate release on parole pending resolution of their habeas corpus petitions is moot.

I will now take testimony related to what assurances and what conditions proposed by the Petitioners, as accompanying their release into this community, and we'll take a 10-minutes recess.

THE DEPUTY CLERK: All rise.

(A BRIEF RECESS WAS TAKEN.)

THE DEPUTY CLERK: Remain seated. This honorable court is again in session.

MR. O'QUINN: Your Honor, we appreciate the Court's ruling and will want to review it.

What I would ask on behalf of the Government is if we could have a stay pending appeal of the Court's ruling. I don't know whether appeal at this point would be authorized. That's something that would have to be conferred by the

Solicitor General. I can tell you those discussions are under way, but I'm not in a position to say that one way or the other.

As the Court said, the Court recognized that no court, other than the *Qassim* court, has directly addressed the issue of release into the United States before. The Court also recognized in the opinion that you read that there is serious separation-of-powers concerns implicated here, and for those reasons and reasons that we're happy to make in a more formal and more complete motion, the Government would seek a stay.

A stay would serve two purposes. One, for the Government to review its options and seek appeal if that is ultimately authorized; and No. 2, also to -- it might very well provide some opportunity to discuss and determine what our position would be on some of the issues that I think that the Petitioners would like to raise today; namely, what would be the implications of the Petitioners' release into the United States and what would immediately follow.

The Court ruled that the Government did not have authority to detain them at Guantanamo Bay because they were no longer being treated as enemy combatants. If, however, they are inadmissible aliens for the reasons that I articulate, particularly under 8 U.S.C. 1182 (a)(3)(B), then if they were in the United States, it may very well be that

DHS would be required to take them into custody pending removal proceedings.

Those are all things that the Government would need some time to assess. I'm sure that opposing counsel would appreciate the opportunity to at least discuss what options might look like if they ultimately are to be released into the United States, and as I said at the outset, of course, there are serious issues for the Government to consider, vis-a-vis, appeal.

So, I know that my colleague is prepared to put on witnesses. The Government's position would be that that is premature and would ask that the Court would --

THE COURT: What is that noise?

THE DEPUTY CLERK: I believe someone has an electronic device on. All electronic devices such as cell phones or Blackberrys are to be turned off.

THE COURT: Otherwise, it interferes with the voice system in the courtroom and with the court reporter's ability to hear what's being said, so if you've got a Blackberry or cell phone or anything else, turn it off, please.

All right. Finish up.

MR. O'QUINN: I just would ask that the Court would stay its ruling pending review.

THE COURT: All right.

MR. O'QUINN: Thank you.

MR. WILLETT: Your Honor, for all the reasons that you mentioned in your order, we would ask you to deny the motion for stay. I have no doubt that there will be some effort to seek an appellate ruling, but it really would be for the Court of Appeals to say whether this is a case that merits a stay, and given their close examination of the same case in *Parhat,* it seems remote indeed that one would be granted, so we would ask that the stay be -- request for stay be denied.

We are prepared, in response to your remarks, to either put on evidence or perhaps it might be more efficient to make a proffer as to where these people would go and what arrangements are in place, and I also have some proposals for conditions.

Now, I understand that your ruling was on release and that parole is now moot, but we've always been willing to give the Court and the Government the comfort of conditions, and so I would propose to go into that as well.

THE COURT: All right. Let me put it this way: If the Court of Appeals concludes that my ruling should stand, it would be my intention to have these -- this group of Uighurs admitted to the United States back before me every six months or so, so that I could take a close look at their adjustment and how they're complying with the conditions we might decide -- agree upon today.

Because I think the Court of Appeals should have the

full scope of what -- of the implications and the full scope of evidence relevant to the reality of these individuals being released into the United States, I think that a proffer and a proposal of conditions that would govern their presence here is appropriate, so the Court of Appeals cannot only look at the law and look at the circumstances but could also look at the facts that will accompany their presence here should their status be legitimized by the Court.

So, the bottom line is, I want to either take evidence, or I get proffers that are clear and certain so that the Court of Appeals can look at that as part of its deliberations in the case.

Second of all, I think that the decision on whether or not there should be a stay should be that of the Court of Appeals. I have urged that there is, in my view, a pressing need to have these people who have been incarcerated for seven years, to have those conditions changed as promptly as possible.

I'm not in a -- I'm not disposed to grant the stay, but it may be that arguments can be presented to the Court of Appeals that will persuade it. All of this means more delay, and delay is the name of the game up until this point. Everything has been delayed.

Third of all, this suggestion that if this court mandates something and the Court of Appeals approves it and

these individuals are brought into the United States by virtue of the Court's directives, that they may be descended upon by I.C.E. officials, arrested and taken into custody, that's not how the three branches of government work together. That is not how things work.

That would be inappropriate to even suggest that at this point one branch of government makes a firm decision on the legitimacy of someone's presence in the country and another branch goes out and scurries to get these individuals now present by virtue of the Court's directives arrested. I assume that won't happen. I certainly wouldn't take it kindly.

But in any event, put on your evidence or give us the proffer that underlies the conditions that you are about to recommend.

MR. WILLETT: Thank you, Your Honor. And I'll begin, if I may, with Susan Krehbiel. I will proffer her evidence. If Susan would stand.

You can sit down now, Susan. Thank you. Susan is with the Lutheran Immigration & Refugee Services based in Baltimore, Maryland. Since 1939, this organization, working closely with the State Department, has been responsible for the resettlement of hundreds -- I'm sorry, of tens of thousands of refugees from all over the world fleeing disasters of every kind, war, famine, genocide, the like.

LIRS works through a network. She will testify of 26 affiliates and 20 suboffices through the country. They have closely worked with, in this case, a network of churches, synagogues and mosques, and other entities in the D.C. area to provide what's called scattered site housing and support for as many as 17 of the Uighur men.

So, these arrangements, which she could describe to you, would be for a place to live, some financial support limited, food, medical care, transportation, details of that kind.

Second, Your Honor, we would proffer the evidence of Kent Spriggs. I would ask Mr. Spriggs to stand for a moment. Kent is an attorney from Tallahassee, Florida. He represented several detainees in Guantanamo cases with considerably more skill than we have. His clients are home. But he has organized a network of both lay and clergy in the Tallahassee area who are deeply experienced in the problems of refugee resettlement, having done this for Vietnamese, for Mariel boatlift refugees and for Katrina victims.

He has -- and we can put into the record -- a commitment from 19 leaders in faith communities in Tallahassee, Christian, Jewish, Muslim, all of whom have offered their personal welcome and support and their commitment to rally those communities to provide practical support for three Uighurs.

And we submitted with our papers a detailed plan that explains that this goes to the level of a spiritual home, the Islamic Center of Tallahassee, of housing, of jobs, of transportation, of healthcare, language training in general, social integration. This has been done before and on a much greater scale, actually, than is involved here.

Next, Your Honor, I'd ask Ms. Rebiya Kadeer to stand. You may sit. Thanks.

Rebiya is president of the World Uighur Congress and of the Uighur American Association. She lives in the D.C. area and she's probably the world's most famous Uighur dissident. She spent almost six years in a Chinese prison. She has a son in a Chinese prison today. She was at one time one of the wealthiest and most successful businesswomen in all of China, but when she went to speak out about Uighur conditions, she was imprisoned. And after Human Rights organizations rallied to her cause, Secretary of State Rice personally interceded and she was admitted to this country as a refugee.

She was awarded the Norwegian Rafto Prize. She has been honored by the First Lady and by President Bush himself.

Now, Ms. Kadeer has organized 17 Uighur families in the Washington area, some of whom are in the courtroom today, and all of whom have made two commitments. The first is a short-term housing commitment as a bridge between the release

of the men and the more permanent solution that Susan at Lutheran Services and Kent with the Tallahassee group have lined up.

And the second is a longer term support arrangement that is logistical in nature. So, for language support, for transportation support, for a culturation, for helping people get to their meetings that they may need to get to for purposes of reporting, things of that kind, there is a tremendous amount of support from the Uighur American community which has followed these cases with great interest.

And last, if I can ask Sara Beinert to stand. Sara is the large donor coordinator for the Center for Constitutional Rights in New York City, an organization well known to this court as -- for its prominence in the Guantanamo litigation.

What you may not know, however, is that it also serves as a clearinghouse for so many concerned citizens around the country who want to help and do something about what they perceive as an injustice, and many of those have made financial contributions.

Ms. Beinert has located a substantial donor, a former successful software businessman who has made a very substantial financial commitment to help resettle such Guantanamo detainees as courts may admit to the country.

Now, I would prefer if I could identify his name and

the extent of the commitment to the Court and counsel off the record just to preserve his privacy, but it is a substantial commitment that she can provide details about.

So, Your Honor, those are the highlights of the program that exists now, and all of these witnesses are available for your questions or the Government's if you would like more detail. If the Government wants to pass on that, I can proceed to what might make sense as a set of orders to accompany your order on the motion for release.

THE COURT: Well, let me ask the Government, do you wish to make inquiry of any of these persons proffered as resources for the Petitioners should their release be secured?

MR. O'QUINN: Judge Urbina, I don't think it would make good sense and be good use of the Court's time for the Government to make such inquiries.

In terms of what conditions might be for persons who the Court would bring into the country under some heretofore undefined status, I think, presents issues for the Department of Homeland Security in terms of what conditions that they might want to impose. Because of the nature of this hearing today in which the Court had noticed that it was going to be a hearing on a motion for release and had noticed in its minute order that the factual issues weren't going to be presented, I don't think we're prepared to make a proffer in terms of what DHS would like to see in terms of conditions.

I understand the Court's concern and I didn't mean to suggest that, you know, it would be, you know, follow as the night does the day that, you know, the moment they showed up in the United States they would be potentially taken into custody. All I'm saying, Your Honor, is that in terms of the INA itself, there are various provisions that would be implicated by their presence in the country that are not implicated while they're outside the country.

I don't know how all that would play out. It's a lot of complicated issues. So, the way to -- I understand that the Court is not inclined itself to grant a stay. If the Court were to -- perhaps the Court would consider granting what I'd call an administrative stay just for purposes of us to be able to put our papers to the Court of Appeals, and then this issue, on terms of what conditions might potentially look like, is something that could potentially be addressed by the Court at a further point in time.

THE COURT: Well, if what you're asking for is a period of time in order to review matters and determine whether or not you're going to pursue appeal or not, that's one thing, but if what you're asking me to do today is to issue a stay on the order itself, I'm not inclined to do that. So if you can clarify precisely.

I mean, I certainly would want to give you and the Attorney General and the Department of Justice time to sort

things out. I don't want you-all to make a hurried decision because my view is that discussions might very well -- could very well resolve matters that now appear to be in controversy, but I'm not going to undermine my own decision by granting a stay because I don't feel and I don't recognize that there is a reason for me to grant a stay under the circumstances, so tell me precisely what you need.

MR. O'QUINN: Judge Urbina, if you would give us a week to be able to discuss the matter internally to take on appeal if the Government determines that an appeal is -- to seek a stay from the Court of Appeals if the Government determines that an appeal is appropriate, and that would also, if an appeal was not taken at that time, because the Government has, obviously, a longer period of time than that, at the conclusion of that period of time, perhaps we would be in a better situation to engage in terms of what release into the United States should actually look like.

THE COURT: All right. And all of that, of course, presupposes good faith on everyone's part because what you're asking me to do is to hold off on executing the order that goes along with this judgment --

MR. O'QUINN: I am --

THE COURT: -- for a week.

MR. O'QUINN: For a week. And in the course of that week, Judge Urbina, we would file our stay papers assuming

that the decision to make -- to take an appeal was made, file our stay papers with the Court of Appeals. If the Court of Appeals granted a stay, then obviously that would be -- that would be that, and if it didn't, then we'd be in a position to better -- in a better position to deal with the specific issues of logistics that I think the Court wants to get into now.

THE COURT: All right.

MR. WILLETT: Your Honor, I would ask to add to the evidentiary record two exhibits.

THE COURT: Do you have a response to the request that's just been made that the Court hold off a week on issuing the order or executing the order so that you-all may have some time and the Government may have some time to review its options?

MR. WILLETT: Yes, Your Honor. Here is my proposal on that. I am going to suggest a set of conditions, one of which would be that your order, which we would suggest enter today, require that the prisoners be brought here on no later than Friday.

That would give the Government time to seek a stay if it is so minded to do and we will be in conference with them immediately following this hearing if they want that as well, but I don't see why we have to wait a week. They have to be focused on this case. It's the first Guantanamo merits

case. They have to have considered their options already, so I would suggest that your order simply set a date in the calendar by which the men must be here and then they either get a stay of that or they don't, and Friday is the suggestion.

THE COURT: And where would they be accommodated? Where would they be placed?

MS. MANNING: Well, my suggestion is --

THE COURT: Is that based on the suggestions you've made with respect to resources that can be provided by the persons you've introduced to the Court?

MR. WILLETT: Yes, if they were to be brought here or to some other place by the parties' agreement in this area, then they would be met both by the service groups we've talked about from the Lutheran group and the Tallahassee group and also by the Uighur American community itself and the 17 families who are prepared right now to provide the immediate bridge, and one of the exhibits I want to offer relates to that.

So, whichever day you pick, even if you were to name tomorrow, which is probably not feasible, logistically, but whichever day you pick, we'll be ready to literally accept those men as they arrive.

Now, if the Government says, "Look, this courtroom is not the right place to do that handover; we want to do it

at Andrews Air Force base," or whatever they may say, that's fine, too. I'm sure we could reach agreement on that as long as it's not North Dakota or somewhere, but that would be my suggestion that your order -- that you order that entry today, set a deadline that will require them to either obtain a stay or not prior to that deadline.

MR. O'QUINN: Judge Urbina, the only point I wanted to make in response is that if the Court is inclined to set a date certain by which they must be brought into the United States before any -- the Court engages in any kind of hearing on what that might look like, if it is the Court's position that there is no role for DHS, for immigration and customs enforcement to play, we'd ask that the Court spell that out in its order so that that issue can be teed up for the Court of Appeals.

As I said, I think it's a separate issue from the issue of ordering release as to their current conditions.

THE COURT: What do you mean by "no role"?

MR. O'QUINN: I mean, that is sort of the question, Judge Urbina. I mean, if you bring them into the country with no status at all, which is what your order would do, we're in completely unchartered territory. Normally, people who are in the country without any kind of status can be taken into custody. It would depend on -- and particularly persons who -- and I'm happy to walk through a litany of their own

admissions as to why it puts them in this category, but persons who would be covered by 1182 would, I think, actually be required under law to be taken into custody pending removal proceedings.

Now, I understand that that seems somewhat at loggerheads with what the Court is hoping to accomplish with its order. I think that's a function of the fact that we are in completely unchartered territory once somebody is ordered into the country having had no previous -- no previous status in the country, and so that's part of why my suggestion would be that if the Court -- you know, this is a -- I understand this to be a -- an injunction. You're ordering them to be brought into the country.

If the Court gives us a week, we can explore our options with the Court of Appeals, and then separate and apart from that, we can explore with the Department of Homeland Security what if any role it thinks that it would play if they were brought into the -- if they were brought into the country, and if a stay was not granted by the Court of Appeals, then we could have a hearing in which the Court can hear from the Government what we think the consequences of them coming into the country might potentially be and what -- what conditions, what arrangements, whether that's anything again ranging from whether our view is that the law would potentially require them to be taken into some from of

protective custody or all the way through to whether it's some sort of reporting requirement or what have you. Those are all issues that this court could then deal with then.

If the Court is just simply saying, "Well, they are going to be released into society and there is no role for the Government to play in the sense of, you know, DHS," you know, maybe normally for persons who meet these criterion, you would have reporting requirements or not, but the Court's view is that because it's ordering them brought into the country, that is without condition as if they have all of the vestiges of having been admitted into the country, that itself presents a separation-of-powers issues.

But if that were the case, then there wouldn't be a role for DHS to play. So, I really think this is a function of us being in somewhat unchartered territory once the Court orders somebody who doesn't previously have any status and hasn't been in the country into the country. So that's the distinction that I'm trying to draw, Your Honor.

THE COURT: Okay. Uh-huh. I understand. What does Tuesday's --

(PAUSE.)

THE COURT: All right. I think the way to proceed, as far as I'm concerned, is this: I am going to order that the Petitioners be brought into the country by Saturday. We will have a hearing on Thursday. What time, Mr. Dales?

THE DEPUTY CLERK: We can do it 2:00 o'clock.

THE COURT: 2:00 o'clock.

MR. WILLETT: The hearing as it would be on conditions?

THE COURT: Yeah, the hearing would be on conditions. A representative of Homeland Security should be present. I do not expect that these Uighurs will be molested or bothered by any member of the United States Government. I'm a federal judge, I've issued an order, and what it says it says and what it implies, it implies, and that's comity among the branches. Nothing will happen to these people until Thursday when this hearing convenes.

A representative of Homeland Security will be present and that individual at that time, through counsel, if necessary, can state its position and lay out its view on what the necessities of the situation are, legal or -- legally or otherwise, but nothing is to bother these people until I see them on Thursday. No one is to bother these people until I see them on Thursday, and they are all to be present here in this courtroom.

MR. WILLETT: On Saturday?

THE COURT: On Thursday. We have the hearing on Thursday. They all are to be here in the country by Saturday.

MR. WILLETT: Okay. And where would they come on Saturday, because, Your Honor, we would arrange for the -- do

you want them ordered brought here or some other place that we agree?

THE COURT: Well, the --

MR. WILLETT: So that we can arrange the handoff.

THE COURT: What are you recommending?

MR. WILLETT: Well, my guess is that here, particularly on a Saturday, it may be infeasible to meet actually.

THE COURT: Friday.

MR. WILLETT: All right. Then I suggest that Your Honor order that they be brought to the courtroom at an hour that you will name on Friday, unless the Government and counsel agree on some other place of hand-over which may be more convenient, and I don't -- the Government will have better ideas on that than I do.

THE COURT: All right. It is so ordered.

MR. WILLETT: Okay. Your Honor, may I add two items to the record? And I've shown these to counsel for the Government.

The first is a statement on resettlement of Uighur parolees from Tallahassee, Florida, and it is the commitment of 19 members of the faith communities in Tallahassee to support the enterprise I describe in the proffer.
Mr. Spriggs, who's in the court, would testify that each of the persons on what I'll call Petitioner's Exhibit 1 has

expressed his or her support for this enterprise.

THE COURT: All right. So we will convene here on Friday. The handoff will take place. The hearing, taking other matters into consideration, will happen on the following Thursday.

MR. WILLETT: Your Honor, I've just been advised that -- and this may apply to both sides. That Thursday is Yom Kippur. I think the judge has ordered this Thursday.

THE COURT: Next Thursday.

MR. WILLETT: I'm sorry, Your Honor.

THE COURT: They will be here by Friday. The following Thursday is when we'll have the hearing.

MR. WILLETT: Your Honor, I am completely confused about the dates.

MR. O'QUINN: I think I'm confused as well, Judge Urbina. I thought that the idea was to have a hearing prior to a time when they would be brought into the country.

THE COURT: No.

MR. O'QUINN: What are you --

THE COURT: Speak up. I can't hear you.

THE DEPUTY CLERK: The Court is still in session.

THE COURT: All right. Please, please, please.

MR. O'QUINN: What I had requested, Judge Urbina, was that we have a hearing on the issues that -- as to what their conditions -- what restrictions, if any, there would be

once they were in the country, that that hearing take place before they be brought into the country.

If they're brought into the country first, I think we'll be in some sort of a uncertainty in limbo as to what -- you know, what law applies, what the conditions are, and frankly, what you have in mind, and so --

THE COURT: Well, there has already been a list of resources referenced. Let me ask counsel for the Petitioners: Are these individuals, either collectively or individually, able and willing to provide housing and support for these individuals from Friday of this week through Thursday of next week when the hearing will be convened?

MR. WILLETT: Yes, Your Honor.

THE COURT: All right. That's the way it's going to be.

MR. O'QUINN: Okay. And I take that, from the Court's order, that DHS could not take them into custody or interview them or anything?

THE COURT: DHS will have a full opportunity here because they will all be here and they will be permitted whatever access DHS or the Attorney General feels is necessary to ensuring the interests that you are protecting.

MR. O'QUINN: Okay. But in the meantime, from the Friday that they arrive until the Thursday of the hearing, there will be no supervision of them; is that my understanding

of the Court's order?

THE COURT: That's right.

MR. O'QUINN: Okay. Thank you, Your Honor.

MR. WILLETT: Your Honor, may I then, just so that we have them in the record, if there's going to be some sort of quick trip to another court, can I offer in evidence these two exhibits?

THE COURT: Yes. What I would like you to do is to memorialize once again, for purposes of attachment to the record of this case and for review by the Court of Appeals, if necessary, the proffers that you have made with the description of the individuals ready, willing and able to take -- to provide assistance and what other documents you have.

MR. WILLETT: There were two -- two statements, Your Honor, one from the Tallahassee group. I'm sorry, Your Honor. Maybe what you're asking me to do is to present the entire proffer in writing later today?

THE COURT: That's right.

MR. WILLETT: Okay.

THE COURT: So, in time, that it can be attached to the record in this case for use by the Government and review by the Court of Appeals.

MR. WILLETT: We will present -- we will file that later today. We'll serve the Government that proffer in

writing today.

THE COURT: All right.

MR. WILLETT: And can I just be clear about the dates that have been ordered? It is Friday of this week.

THE COURT: Friday of this week is the 10th.

MR. WILLETT: And on that day we are to be back before Your Honor with the prisoners present to discuss conditions?

THE COURT: Correct. And then -- well, we've set Thursday of next week for the actual hearing. I want to meet with these Uighurs and I want to have them here. I want to see the individuals who will be taking custody of them pending the hearing on Thursday, and then on Thursday is when the Department of Homeland Security and any other persons that the Government wishes to have present will be available to represent their position and to examine any witnesses that you present in support of your position.

MR. WILLETT: Thank you, Your Honor.

THE COURT: 2 o'clock.

MR. WILLETT: What time on Friday, Your Honor?

THE COURT: Friday, 10:00 o'clock. And Thursday the 16th, 2:00 o'clock.

MR. WILLETT: Thank you very much, Your Honor.

MR. TIRSCHWELL: Judge, could we still have one minute to discuss something?

THE COURT: All right. Let's finish up, please.

MR. TIRSCHWELL: Thank you.

(PAUSE.)

MR. WILLETT: Your Honor, one last thing. My colleague reminds me that the Government was kind enough to permit our colleague, Wells Dixon, who is in Guantanamo right now, to actually meet with the Petitioners together -- This has never been permitted before -- later today.

So I am very gratified that they'll actually be able to learn of Your Honor's order, perhaps -- provided we can find some way to communicate the message to Mr. Dixon, but I'll ask the Government to help us accomplish that this afternoon.

THE COURT: All right. I'm sure the Government will assist you if it's possible.

MR. WILLETT: Thank you, Your Honor.

THE COURT: All right, Mr. Dales.

THE DEPUTY CLERK: All rise.

(PROCEEDINGS END AT 12:16 P.M.)

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CERTIFICATE OF REPORTER

I, Catalina Kerr, certify that the foregoing is a correct transcript from the record of proceedings in the above-entitled matter.

_____ _____

Catalina Kerr Date

EXHIBIT I

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

IN RE:	:	Misc. No.:	08-0442 (TFH)
	:		
GUANTANAMO BAY	:	Civil Action Nos:	05-1509 (RMU)
DETAINEE LITIGATION.	:		05-1602 (RMU)
	:		05-1704 (RMU)
	:		05-2370 (RMU)
	:		05-2398 (RMU)
	:		08-1310 (RMU)
	:		
	:	Document Nos.:	133, 134, 172

ORDER

GRANTING THE PETITIONERS' MOTIONS FOR JUDGMENT ON THEIR PENDING HABEAS PETITIONS AND DENYING AS MOOT THE PETITIONERS' MOTIONS FOR IMMEDIATE RELEASE ON PAROLE INTO THE UNITED STATES

For the reasons stated in the accompanying Memorandum Opinion, it is this 8th day of October, 2008,

ORDERED that the motion of Huzaifa Parhat and four other petitioners for judgment on their habeas petitions and release into the continental United States is **GRANTED**; and it is

FURTHER ORDERED that the motion of Huzaifa Parhat and four other petitioners for immediate release on parole into the continental United States pending final judgment is **DENIED as MOOT**; and it is

ORDERED that the remaining petitioners' motion for immediate release on parole into the continental United States pending final judgment and for release into the continental United States is **DENIED as MOOT as to immediate release on parole** and **GRANTED as to release into the United States**; and it is

FURTHER ORDERED that the government shall produce each of the petitioners before this court on Friday, October 10, 2008 at 10:00 am, at which time the court will impose such short-term conditions of release as it then finds reasonable and appropriate; and it is

ORDERED that a hearing shall take place on Thursday, October 16, 2008 at 2:00 pm, at which time the court imposed terms and conditions will be reassessed and altered if necessary; and it is

FURTHER ORDERED that a representative from the Department of Homeland Security be present at the October 16, 2008 hearing.

SO ORDERED.

RICARDO M. URBINA
United States District Judge

EXHIBIT J

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

IN RE: GUANTANAMO BAY DETAINEE LITIGATION	Misc. No. 08-442 (TFH)
JAMAL KIYEMBA, *et al.*, Petitioners, v. GEORGE W. BUSH, *et al.*, Respondents.	Civil Action No. 05-1509 (RMU)

REPLY OF HUZAIFA PARHAT TO GOVERNMENT'S OPPOSITION TO MOTIONS FOR PAROLE AND JUDGMENT ORDERING RELEASE

Susan Baker Manning
Catherine Murphy
BINGHAM McCUTCHEN LLP
2020 K Street, N.W.
Washington, D.C. 20006
Telephone: (202) 373-6000
Facsimile: (202) 373-6001
susan.manning@bingham.com
catherine.murphy@bingham.com

Sabin Willett
Neil McGaraghan
Rheba Rutkowski
Jason S. Pinney
BINGHAM McCUTCHEN LLP
One Federal Street
Boston, MA 02110-1726
Telephone: (617) 951-8000
Facsimile: (617) 951-8736
sabin.willett@bingham.com
neil.mcgaraghan@bingham.com
rheba.rutkowski@bingham.com
jason.pinney@bingham.com

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Huzaifa Parhat replies to the Respondent's Combined Opposition to Parhat's Motion for Immediate Release Into the United States and to Parhat's Motion for Judgment on his Habeas Petition ("Opposition") as follows.

ARGUMENT

A. The Court Has The Power To Order The Relief Sought By Parhat.

The government's broad proposition is that it may concede that Parhat is not an enemy combatant and hold him at its pleasure anyway. This Court, the government contends, can offer no relief.

If the government is right, then six years of litigation and two trips through the entire apparatus of the federal judiciary were pointless. *Boumediene v. Bush*, 553 U.S. ___, 128 S. Ct. 2229 (2008), was a tempest in a teapot. The Secretary of Defense can concede that Parhat is a noncombatant, as he has done here. Opp. at 4-5. The government can spend four fruitless years—as it claims to have done here—exhausting every other corner of the earth where Parhat might safely be sent. The Court of Appeals can order release. None of that matters.

If the government is right, this Court is a debating society. At the end of our debate, this Court is permitted an essay about who prevailed, but that is all. The lawyers will go home (or perhaps proceed to another debating society, for another round). The most ancient proposition of judicial review, that a court can force the King or the President to release an innocent from a prison, is charming history. Because the government's view is that nothing *real* may come of it. Parhat will return to an imprisonment that already exceeds the sentence of the convicted war criminal Salim Hamdan—if the government is right.

But the government is not right, either as to both the broad proposition or as to the narrow points we address below. We encourage this Court, as it considers these narrow points, to reflect on what it would actually mean to judicial review *if the government were right.*

B. Under The D.C. Circuit's Order, The Government, Having Waived Its Re-CSRT Right, *Must* Release Parhat Into The Continental United States.

The government's Opposition has changed this case profoundly. On August 5, 2008, the government advised this Court (i) of no present plan to transfer Parhat (it contemplates holding him), and (ii) that it has waived the option to convene a new CSRT. Opp. at 2.

On June 20, the D.C. Circuit left the government with three choices. The Court "direct[ed] the government to release or to transfer the petitioner, or to expeditiously hold a new CSRT consistent with this opinion." *Parhat v. Gates*, 2008 WL 2576977, at *18 (D.C. Cir. June 20, 2008). The Court did not suggest or advise. It directed. And it did not direct that Parhat be released or transferred when it was convenient for the government to do so. It did not qualify the order. The Secretary might convene a new CSRT *expeditiously*. Otherwise Parhat was to be released, or transferred. Period. Nearly two months have passed. Because the government has not transferred Parhat and has waived the right to hold another CSRT, only one choice remains. The immediate right of release is no longer a matter for evidence, or briefing, or even judicial determination by this Court. The government must release Parhat because it has been ordered to do so. This point is dispositive and renders all the other points academic. We address below the government's arguments concerning the Court of Appeals' order.

1. The alternative the government proposes—to improve Parhat's conditions of imprisonment[1]—is not, in any way, shape or form, release. Parhat will still be imprisoned at the Guantánamo prison, perhaps forever: "Petitioner would remain there until he can be transferred to another country willing to accept him." Opp. at 5. At the government's whim, he might be sent back to the cruel isolation of Camp 6: "[Parhat would] remain [in improved conditions] . . . absent any misconduct or other behavior jeopardizing operational security." *Id.* What is misconduct? What jeopardizes operational security? Whatever the government decrees. The government has only just advised the Court that it exercises absolute power to say who goes where, and when, and under what conditions, at Guantánamo Bay. Respondents' Opp. to

[1] *See* Opp. at 5. It does not say when it will do so. "DoD *plans* to house Parhat as one who is no longer an enemy combatant." *Id.* (emphasis added).

Petitioners' Motion for Temporary Restraining Order and Preliminary Injunction, filed in *Kabir v. Bush*, No. 05-1704 (July 11, 2008, Dkt. No. 87). On August 7, denying the motion for injunctive relief filed in consolidated cases, this Court agreed. *In Re Guantánamo Bay Detainee Litig.*, 2008 WL 3155155, at *5 (D.D.C. Aug. 7, 2008). So the government proposes to imprison Parhat as long as it likes.

2. The government argues, *see* Opp. at 10-13, that it has a right to effect repatriation on its own timetable. In *Qassim v. Bush*, 407 F. Supp. 2d 198 (D.D.C. 2005), a case addressing efforts to repatriate the Uighurs three years ago, the court held that there is no such power. *Id.* at 201. And even if such power had existed before, the Court of Appeals' order to release or transfer Parhat forecloses it here.

Even if the government had a "wind-up" power, it was used up long ago.[2] The government seriously misrepresents what has happened here by suggesting—without evidence of any kind—that we are now at the *beginning* of a repatriation process. Opp. at 12-13. That is simply false. We are at the *end* of a five-year failed effort by the government to repatriate Parhat and the other Uighurs. The government long ago determined that it cannot effect a transfer. Its own record in its own CSRT established that as of October 29, 2004, "Spokesman Richard Boucher said the Bush administration is trying to relocate the Uighurs. The State Department has contacted a number of countries about the resettlement of the Uighurs." CTA App. 106.[3] It claimed vigorous efforts were underway a year later. Opening Br. at 14. The litigation has been a stalling tactic, undertaken in Uighur cases since 2005, to buy time for this repatriation. *See*

[2] The government cites no legal authority for its claimed "wind up" power, and makes no historical case either, citing inapposite history involving North Korean and Chinese soldiers taken on the battlefields of Korea, and the Geneva-compliant, six-months-and-done post-war operations of the First Gulf War. (The Uighurs never marched out from China as soldiers; indeed, they were never soldiers at all.) The government never addresses the actual post-war conditions of World War II prisoners of war. It never explains what, if anything, limits this "wind-up" power. Indeed, it is clear that nothing would limit it. The proposition is that the Executive may seize anyone, anywhere on the Globe — *by mistake* — hood him, shackle him, and take him to an island forever, as long as it assures us that it is pursuing an "orderly" windup. Among other things, this proposition cannot withstand *Boumediene*.

[3] Citations to "CTA App." are to pages of the unclassified version of the record on review in the Court of Appeals. Cited pages are attached hereto as Exhibit A.

Qassim, 407 F. Supp. 2d at 200. Through every day of that time Parhat's confinement has continued. Today the government has offered this Court *no* evidence of what, if anything, it is doing to effect release or transfer, or why there is any reason to hope in 2008 for success. The government's proposal is simply for more delay, and amounts to another multi-year sentence for a civilian never even charged with wrongdoing. Opp. at 13.

For the few months that separated their work-release from transportation home, the Italians POWs had vastly more liberty than Parhat. *See* Opening Brief at 6. But to put the experience of the Italian POWs in perspective, our government has been trying to resettle Parhat, who was never an enemy combatant, for longer than the entire period during which the Italians, who *were* enemy combatants, fought, were captured, held as POWs, and then repatriated.

3. The government argues that the Court of Appeals "did not resolve the question of whether it may order release pursuant to the DTA." Opp. at 7. This is plainly incorrect. It will help to set out the key language in the decision, complete with the footnote reference:

> We therefore direct the government to release or to transfer* the petitioner, or to expeditiously hold a new CSRT consistent with this opinion. This disposition is without prejudice to Parhat's right to seek release immediately through a writ of *habeas corpus* in the district court, pursuant to the Supreme Court's decision in *Boumediene*, slip op. at 65-66.

Parhat, 2008 WL 2576977, at *18. A footnote appended to the word, "transfer," directs the reader to footnote 19, which in turn refers to *this* Court's 2005 order requiring the government to give notice of any intent to remove Parhat from Guantánamo to a third nation. "This disposition," the Court wrote (*i.e.*, disposition of release, transfer or new CSRT as a remedy in *the DTA action*) is "without prejudice to Parhat's right to seek release immediately through a writ of *habeas corpus*." *Id.* This careful language tells us two things. First, release (or transfer, or re-CSRT) *was part of the DTA remedy* ordered by the Court of Appeals.[4] Second, the difference between DTA release, as ordered by the Court of Appeals, and *habeas* release, which

[4] This point is made repeatedly and emphatically at *14 and *18. Elsewhere in the opinion, denying the suggestion "that we will countenance the 'endless do-overs' that Parhat fears," the Court "note[d] that DTA review is not Parhat's only, or his best, path to release." *Id.* at *15. That is a plain statement that DTA review *is* a path to release—simply not the best one.

Parhat is also entitled to pursue here, was that last June the Court of Appeals thought *habeas* provided *faster* release (and, in the event of a contest, more procedural rights). DTA release was conditional on the government's non-exercise of its other options, but Parhat was entitled to seek a faster release even if a re-CSRT was pending.

4. The government argues that the Circuit "did not address the different question of whether a habeas court could order Parhat's release *into the United States*." Opp. at 7 (emphasis added). This too is wrong. Release into the United States is precisely what the Court of Appeals addressed. We have already noted that the careful use of different terms, "release," and "transfer," must have meant that release was something *other* than transfer—*i.e.*, something other than delivering Parhat to the custody of another, *see* Opening Brief at 11—a point to which the government never responds.[5] The point is further underscored by the placement of the footnote. The Court footnoted *transfer* (not *release*) as an event that would require advance notice to this Court. (By contrast, of course, releasing Parhat into the United States requires no notice because it creates no risk of harm to Parhat.) The Court of Appeals exhaustively analyzed the record about Parhat himself, and repeatedly demonstrated its understanding that China was unavailable to him. *See* 2008 WL 2576977 at *2 (Parhat fled China because of "oppression and torture imposed on Uighur people by the Chinese government") (internal citations omitted); *id.* at *4 (noting panel's urging that he not be forced to return to China where he would "almost

[5] In fact, the government has asserted in related proceedings that *any* transportation of a detainee to a foreign country must "consist of, in the first instance, a *transfer* to the control of the government of the destination country." Respondents' Mem. in Opp. to Petitioners' Motions for Temporary Restraining Order And Preliminary Injunction Barring Transfer or Release or Requiring Advance Notice of Transfer or Release, at 8 n.8, filed in *Zakirjan v. Bush*, No. 05-2053 (HHK) (Nov. 3, 2005, Dkt. No. 9) (emphasis added); *id.* ("To be clear, a transfer for release would consist of, in the first instance, a transfer to the control of the government of the destination country. This is necessary because sovereign nations have borders and any transfer must be coordinated with the foreign government concerned. The United States is not in a position to transport individuals to foreign countries and introduce them into civil society there without the involvement of the government concerned.") (citations omitted). It thus necessarily follows that "release" *by* the United States (as opposed to release by a foreign government consequent to that person being "transfer[red by the United States] to the control of the government of the destination country," *id.*) must mean release within the United States.

certainly be treated harshly"). The Court of Appeals knew that "release" to China was not an option when it said, in the most emphatic possible terms, that there is "no question but that *[this Court]* will have the power to order him released." *Id.* at *15 (emphasis added).[6]

The government may not like the decision, but the D.C. Circuit's words were plain. In his DTA action, Parhat received a disposition—then conditional, but now absolute—of release, *and* Parhat is also entitled to seek more immediate release—regardless of further CSRT proceedings—in *habeas*.

5. The D.C. Circuit's ruling is "best read" as not compelling release, the government says, because it has filed a petition for rehearing. Opp. at 7 n.1. This argument has no merit. The filing does not change the effect of the pending order. The government has not obtained a stay. Petitions for rehearing are so routinely denied that the prevailing party is not even permitted to respond unless the Court requests a response. *See* Fed. R. App. P. 40(a)(1), (3). The filing of such a petition does not in any way excuse this litigant from scrupulous compliance with a clear judicial order of the panel.[7]

6. The government argues that *Boumediene* "makes clear that release is not the appropriate [remedy] in every case in which the writ is granted." Opp. at 3. Two points bear mention here. First, *Boumediene* is a decision about *habeas corpus*. It does not limit the force or effect of the D.C. Circuit's judgment in Parhat's DTA case, and *the Court's clear judicial order as to his DTA remedy*. Second, the government has omitted context showing that Justice Kennedy's reference was to a situation that the government has now conclusively abandoned.

[6] The Court of Appeals cited *Boumediene*, quoting the majority's conclusion that the *habeas* court has "authority to . . . issue appropriate orders for relief, including, if necessary, an order directing the prisoner's release." 128 S. Ct. at 2271. Of course, in the usual Guantánamo case, release would not be necessary, because the prisoner might be transferred to his home country. Release is obviously "necessary" here.

[7] The rehearing petition does not cite authority for reconsideration. Given the panel's careful and lengthy attention to remedy, and its invocation of the carefully-chosen words by which it ordered the parties to act in three separate places in the opinion, *see* 2008 WL 2576977 at *1, *15, *18, it is fanciful to suggest that the Court is now going to edit its opinion, merely because the government finds it disagreeable to comply. The government is out of time to seek *en banc* review. *See* Fed. R. App. P. 35(c). *Parhat v. Gates* will certainly stand unless the Supreme Court orders to the contrary, and no one has sought such relief.

The citation comes from section V of the majority opinion, which addresses whether the DTA is an adequate substitute for *habeas*. Subsection B discusses key attributes of *habeas*. Among them is release. The government's quotation comes from this section:

> And the *habeas* court must have the power to order the conditional release of an individual unlawfully detained—though release need not be the exclusive remedy and is not the appropriate one in every case in which the writ is granted.

Id. at 2266. In support of this proposition Justice Kennedy cites three authorities: two directing that the prisoner must be released,[8] and a third, *Chessman v. Teets*, 354 U.S. 156 (1957), which ordered remand of a *habeas* petitioner's case for retrial, where the petitioner had demonstrated *an error of law in the trial*. *Id.* at 2266-67. Plainly it was to that latter scenario that the phrase, "not the appropriate one in every case" refers. That situation is familiar. A *habeas* petitioner complains of a constitutional failure in his trial. The *habeas* court agrees. But there was substantial evidence of guilt. So the remedy is not release, but rather remand so that the petitioner may fairly be tried. Here there was no trial. And the government does not seek one now. It expressly waived the right to pursue any further litigation of whether it has a legal right to detain. Accordingly the quotation is irrelevant here.

7. The government never addresses a simple point. Whatever "release" and "transfer" may mean, how does its proposed new prison regimen for Parhat constitute either? The government simply proposes to violate an order of the Court of Appeals.

C. The Government's Misstatements Of The Record Cannot Justify Withholding The Release Remedy.

In this section Parhat addresses the government's systematic misstatements of fact, the evident object of which is to frighten the Court. We emphasize how remarkable the Opposition is. The Court of Appeals closely reviewed the government's entire record and held that it could support no disposition other than release or transfer. The government has waived the right to

[8] *Ex Parte Bollman*, 4 U.S. (Cranch) 75 (1807) (court "can only direct [the prisoner] to be discharged"); R. Hurd, TREATISE ON THE RIGHT OF PERSONAL LIBERTY, AND ON THE WRIT OF HABEAS CORPUS AND THE PRACTICE CONNECTED WITH IT: WITH A VIEW OF THE LAW OF EXTRADITION OF FUGITIVES 222 (2d ed. 1876) (prisoner has "right to be delivered") (cited in *Boumediene*, 128 S. Ct. at 2266-67).

alter that record. So now the government misstates that record to persuade this Court to deny the very remedy the Court of Appeals demanded. The government proceeds with few citations to the record on review in the Court of Appeals, no evidentiary submission to this Court, and in many cases with serious errors. This is a second bite at a bitten apple. It should be rejected on its face. In the event it is not, we address the government's errors in turn.

1. The government says, "it is undisputed that Parhat went to Afghanistan with the purpose of 'receiv[ing] training from a camp affiliated with enemies of this country.'" Opp. at 2. This is false as a matter of law. The Circuit held that there was no reliable evidence that "ETIM" (the entity with which Parhat is charged with being affiliated) was sufficiently "affiliated with enemies of this country"; indeed, it devoted three portions of its opinion, subsections III.B, III.C, and section IV, to demonstrating the proposition false. *See* 2008 WL 2576977 WL at *9, *10 & *11 n.12. Parhat denies that he attended any camp affiliated with enemies of this country. He testified that, "from the time of our great grandparents centuries ago, we have never been against the United States and we do not want to be against the United States," and that "[w]e are willing to be united with the United States." CTA App. 21. Parhat further testified:

> Q. Did the Taliban people ever approach you and ask you to fight with them against their enemies?
>
> A. No. In four months we built a house at the camp and we didn't see any other people there.
>
> Q. Was it only Uighur People you saw everyday when you were there?
>
> A. Yes.

CTA App. 024.

> Q. There is a concern that Mr. Hassan Maksum may have relationships with al Qaida people. Do you know any thing about this?
>
> A. I don't think so. The people in Turkistan will not associate with al Qaida.

CTA App. 025. If the contention—and it is an outrageous one, given the record, and the Circuit's decision—that Parhat has ever contemplated associating with enemies of this country

forms any basis of this Court's consideration, Parhat demands his right under 28 U.S.C. § 2243 (cl. 5), to be present in court for an evidentiary hearing so that he may refute it. Parhat would present his own testimony, and that of five Uighurs who were his companions, and who were determined to be noncombatants by the military and were sent to Albania on May 5, 2006, including Abu Bakker Qassim and Adel Abdul Hakim. Parhat would also offer CSRT records of two additional companions, prisoners Hammad (ISN 328, now held in Camp 6), and Ali (ISN 250, now held in Camp 4), each of whom was determined by a military panel not to be a combatant in 2004, only to have the result ordered reversed by the Pentagon. Parhat would also subpoena and offer evidence of Respondent's representations made to the Albanian government concerning the Executive's assessment of the five released Uighurs sent to Albania in 2006.

2. The government says that Parhat went to "a military camp supported by the Taliban." Opp. At 10. The Circuit made no such finding. Parhat denies that statement, and the Circuit itself noted there was no evidence on the point. 2008 WL 2576977, at *10. The Taliban simply happened to be the prevailing government in Afghanistan, at a time when Uighur refugees found it easier to congregate in Afghanistan than in neighboring Chinese satellites. *Id.* At an evidentiary hearing, Parhat would present evidence of this point noted by the Circuit.

3. The government says that the camp was "run by the East Turkistan Islamic Movement."[9] Opp. at 10. Parhat denies knowledge that this is true. Evidently this is a reference to Hassan Maksum, whom Parhat saw at the camp. The government *alleged* that Maksum was a leader of ETIM, and was planning hostilities against China, but the government has never offered (in any court) admissible evidence that either proposition is true. The government offers none now. Parhat denies it and demands an evidentiary hearing on this point if the Court regards it as material. At such a hearing, Parhat would call as witnesses himself and Mr. Omer Kanat, a

[9] The existence of ETIM has been called into question by serious scholars. *See, e.g.*, The Roberts Report on Central Asia and Kazakhstan: Lambs to the Slaughter (Aug. 5, 2008), *available at* http://roberts-report.blogspot.com/2008/08/lambs-to-slaughter-what-is-east.html. There is considerable evidence that many reports concerning ETIM have been generated by China for propaganda purposes. *See id.*

correspondent for Radio Free Asia who has interviewed Mr. Maksum (Maksum is now believed dead), and other witnesses.

4. The government then makes this astonishing (and unsourced) statement: "It is also undisputed that ETIM is engaged in violent resistance to Chinese rule over portions of western China, and that Parhat traveled to its camp to join that resistance." Opp. at 10. *Every aspect* of that statement is disputed by Parhat. No admissible evidence supports it. Parhat denies it and demands an evidentiary hearing, if the statement is deemed in any respect material to the Court's judgment. At such a hearing, Parhat would testify himself, and would call scholars of East Turkestan such as Prof. Gardner Bovington of the University of Indiana, Prof. Sean R. Roberts, a professor of International Development at George Washington University, Prof. Yitzhak Shichor of Haifa University, Mr. Alim Seytoff, general secretary of the Uyghur American Association, Ms. Rebiya Kadeer, a Uyghur dissident jailed by the Chinese and admitted as an asylee by this country, and other persons knowledgeable about the relentless propaganda of China in respect of the so-called "ETIM."

5. The government says it is undisputed that Parhat was captured "in the nearby Tora Bora caves." Opp. at 10. The statement is false. There is no evidence in the record to support it. Parhat was sold for a bounty in Pakistan. CTA App. 29. If this point is deemed material, Parhat demands his right to testify and refute it.

6. Perhaps most important, Parhat now insists—as he *must* insist, in light of the persistent character assassination in the Opposition—on a meaningful chance to respond to *any* point this Court deems material. After seven years, he has earned that right. He desires to appear before this Court, to look the Court in the eye and be looked in the eye, to give an account of his character and his desire to live peacefully, and point-by-point to refute, firmly, credibly, and plainly the government's campaign of distortion and innuendo.

D. The Law of Immigration Affords No Defense.

The government argues that the law of immigration bars Parhat the remedy ordered by the Circuit. Opp. at 13. The government is wrong.

1. The government persists in asserting that Parhat seeks immigration relief. *See, e.g.*, Opp. at 13. We think the government understands Parhat's position well enough. Parhat has not asked for admission into the United States. He has not asked for asylum. He has not asked for any immigration status. He does not ask this Court, in any way, to interfere with whatever his immigration status is today.

Similarly, the "parole" power invoked here is not *immigration* parole, in which the Secretary of Homeland Security has a *statutory* power to exercise discretion to permit an alien without legal right into the country. We think this was also plain enough from our Opening Brief, but we will try again. The parole we seek is *habeas* parole—the fundamental equitable power of a *habeas* court to order a petitioner's release on parole or bail pending a determination on the merits of his claim. *Mapp v. Reno*, 241 F.3d 221, 226 (2d Cir. 2001) ("[T]he federal courts have inherent authority to admit to bail individuals properly within their jurisdiction."); *Baker v. Sard*, 420 F.2d 1342, 1343 (D.C. Cir. 1969) ("When an action pending in a United States court seeks release from what is claimed to be illegal detention, the court's jurisdiction to order release as a final disposition of the action includes an inherent power to grant relief *pendente lite*, to grant bail or release, pending determination of the merits."); *Johnston v. Marsh*, 227 F.2d 528, 531 (3rd Cir. 1955) ("One of the inherent powers of the judiciary with regard to proceedings before it has been the admission of a prisoner to bail where, in the exercise of his discretion, the judge deems it advisable."). This power is not tied to any specific statutory authorization. *Mapp*, 241 F.3d 226-27; *see also Wright v. Henkel*, 190 U.S. 40, 63 (1903) ("We are unwilling to hold that the circuit courts possess no power in respect of admitting to bail other than as specifically vested by statute, or that, while bail should not ordinarily be granted in cases of foreign extradition, those courts may not in any case, and whatever the special circumstances, extend that relief."). And it has nothing to do with immigration. *See Principe v. Ault*, 62 F. Supp. 279, 283 (N.D. Ohio 1945) ("[T]he power to order bail must be determined entirely by the law applicable to *habeas corpus* . . . .").

Courts have repeatedly recognized that, in exercising this inherent authority, the judiciary is empowered to grant bail to a *habeas* petitioner who is not entitled to admission into the United States under the immigration laws. *See, e.g., Mapp*, 241 F.3d at 231 (federal courts have inherent authority to grant bail to alien *habeas* petitioners detained by the INS); *Whitfield v. Hanges*, 222 F. 745, 756 (8th Cir. 1915) (in a *habeas* proceeding, "the court has ample power to admit the alien to bail or to take his own recognizance"); *Smith v. United States Dep't of Justice*, 218 F. Supp. 2d 357, 363 (W.D.N.Y. 2002) ("Federal courts have inherent authority to permit INS detainees to be released with conditions."); *Tam v. INS*, 14 F. Supp. 2d 1184, 1190 (E.D. Cal. 1998) (approving decision of magistrate judge in a *habeas* proceeding ordering the conditional release of an alien subject to a deportation order); *Ault*, 62 F. Supp. at 280-84 (a district court "has authority to grant bail to an alien ordered deported pending the hearing of his application for writ of *habeas corpus*"). These cases do not turn on the immigration status of the petitioner; they are firmly grounded in the court's *habeas* power. *Ault*, 62 F. Supp at 281, 284 (concluding finding that the power to admit a *habeas* petitioner to bail is incident to the power to hear and determine the case). Contrary to the government's contentions, Parhat's immigration status as an inadmissible alien does not prevent the Court from ordering his parole into the United States. *See also Clark v. Martinez*, 543 U.S. 371, 387 (2005) (ordering the release of an inadmissible alien into the United States in a *habeas* proceeding).

It has long been recognized that parole of non-citizens does not confer any of the statutory rights that would accompany "admission" or "entry" for immigration purposes. *See Leng May Ma v. Barber*, 357 U.S. 185, 188 (1958) ("For over a half century this Court has held that the detention of an alien in custody pending determination of his admissibility does not legally constitute an entry though the alien is physically within the United States. . . . Our question is whether the granting of temporary parole somehow effects a change in the alien's legal status. . . . Congress specifically provided that parole "shall not be regarded as an admission of the alien[.]"); *Kaplan v. Tod*, 267 U.S. 228, 230-31 (1925) (excludable alien paroled into U.S. held not to have made an "entry" under the immigration statute); *Chin Yow v. United States*, 208

U.S. 8, 12-13 (1908) ("petitioner gains no additional right of entrance by being allowed to pass the frontier in custody for the determination of his [*habeas*] case"); *Succar v. Ashcroft*, 394 F.3d 8, 15-16 (1st Cir. 2005) ("A paroled individual is not considered 'admitted' into the United States: he is an 'applicant for admission.'"). In *Barber*, a Chinese woman filed a *habeas* petition alleging that her parole into the United States from 1952 to 1954 effected an entry for immigration purposes. 357 U.S. at 185-86. The Supreme Court rejected this argument, concluding that "petitioner's parole did not alter her status as an excluded alien or otherwise bring her within the United States" pursuant to the immigration laws. *Id.* at 186 (internal quotation omitted). The Court reasoned:

> The parole of aliens seeking admission is simply a device through which needless confinement is avoided while administrative proceedings are conducted. It was never intended to affect an alien's status, and to hold that petitioner's parole placed her legally 'within the United States' is inconsistent with the congressional mandate, the administrative concept of parole, and the decisions of this Court. . . . Certainly this policy reflects the humane qualities of an enlightened civilization.

Id. at 190. This principle has long since been codified. 8 U.S.C. § 1101(a)(13)(B) ("An alien who is paroled . . . shall not be considered to have been admitted."); 8 U.S.C. § 1182(d)(5)(A) (parole of alien by Attorney General "shall not be regarded as an admission of the alien"). It is thus abundantly clear that parole will not affect Parhat's immigration status but would simply avoid "needless confinement" while this case is pending. Immigration law poses no bar to Parhat's parole into the United States.

The government's citation to *Bolante v. Keisler*, 506 F.3d 618, 620 (7th Cir. 2007), *see* Opp. at 17, is unavailing. First, *Bolante* affirms (as Parhat argues) that "[i]nherent judicial authority to grant bail to persons who have asked for relief in an application for *habeas corpus* is a natural incident of *habeas corpus*, the vehicle by which a person questions the government's right to detain him." *Id.* The *Bolante* court recognized that "[a] judge ought to be able to decide whether the petitioner should be allowed to go free while his claim to freedom is being adjudicated." *Id.* Second, *Bolante* is distinguishable. In that case, the Seventh Circuit denied the petitioner's bail motion after the Board of Immigration Appeals denied his application for

asylum. The court based its decision on a statute that limited judicial review of a denial of discretionary relief in a removal proceeding. Whatever the merits of this decision, it has no application here because Parhat is not presently seeking asylum, nor is he appealing a denial of discretionary relief. As the court in *Mapp* determined, "[a]bsent a clear direction from Congress, federal judicial power is unaltered, and the authority of the federal courts to admit to bail parties properly within their jurisdiction remains unqualified." 241 F.3d at 227-28. Thus, *Bolante* is not on point, and does not support the government's position.

2. The government asserts that release is barred because Parhat, despite winning his case, is associated with ETIM, which, in turn, is designated as a "terrorist organization" on certain lists. This distortion is remarkable for two reasons; first, because *the Court of Appeals held that affiliation with designated organizations is utterly irrelevant, see Parhat*, 2008 WL 2576977, at *9, and second, because *there has been no finding of such affiliation* in any event. Parhat denies such an affiliation. If the issue is relevant,[10] he demands the right to be present and to call witnesses as set out above. Parhat would make several points. First, he demands the right to demonstrate, at an evidentiary hearing, that he is not affiliated with ETIM, through the CSRT panel's finding that there was no source indication that he ever joined ETIM, *see id.* at *9, and through his testimony and that of the similarly situated Uighurs. Second, he could never have been affiliated with ETIM at any time that ETIM was on a list of designated organizations, since it went on the list long after he was imprisoned at Guantánamo.[11] He would show at a hearing that in the month of his capture the State Department *denied* that ETIM was a "terrorist organization." *See* U.S. Dep't of State 2001 Report on Foreign Terrorists, *available at* http://www.state.gov/s/ct/rls/rpt/fto/ 2001/5258.htm. Third, he would show at an evidentiary hearing, at which he would call as a witness former Deputy Secretary of State Richard Armitage,

[10] Because he is not seeking to enter as an immigrant, it is immaterial whether Parhat is affiliated with a designated organization in any event.

[11] ETIM was not designated as a Foreign Terrorist Organization for immigration purposes under INA § 212(a)(3)(B)(vi)(II) until April 2004, nearly two years after Parhat was sent to Guantánamo. *See* 69 F.R. 23555 (Apr. 29, 2004).

that the ETIM "terrorist organization" designation was made by the State Department in September, 2002, and was agreed to in an August, 2002, meeting between Mr. Armitage and senior Chinese officials, at which Mr. Armitage promised the Chinese he would make the designation as a *quid pro quo* to induce Chinese support for U.S. war plans in Iraq. *See* Transcript of Deputy Secretary of State Richard Armitage Press Conference—Conclusion of China Visit (Aug. 26, 2002), *available at* http://lists.state.gov/SCRIPTS/WA-USIAINFO.EXE?A2=ind0208d&L=us-china&H=1&O= D&P=75. He would further show at an evidentiary hearing that the designation of ETIM as a "terrorist organization" by the U.N. was made at the behest of China. *See* Human Rights Watch Report, *Devastating Blows, Religious Suppression of Uighurs in Xinjiang: II, available at* http://hrw.org/reports/2005/china0405/4.htm.

3. The government's mischaracterization of Parhat's position is relentless. Citing *Clark v. Martinez*, 543 U.S. 371 (2005), and *Zadvydas v. Davis*, 533 U.S. 678 (2001), the government says that Parhat "urges, however, that the immigration laws authorize his immediate release or parole." Opp. at 15. Again, it is not a question of rights under the immigration laws. Those decisions hold that a person cannot indefinitely be detained, even where the Executive is authorized by statute to detain indefinitely. That the statute in question in these cases was an immigration statute was immaterial—these decisions secure a right of release *wholly outside any immigration rights, because the petitioners in those cases had no immigration rights.* The rule of each case is that *no* statute can be read to permit indefinite imprisonment—even if it deals with alien criminals and appears on its face to authorize their indefinite imprisonment. The point is that indefinite detention, whatever its cause, is impermissible. The government's attempt to distinguish the cases, so far as it is comprehensible at all, appears to be that because they hold only that indefinite detention specifically authorized by a particular statute is impermissible, the government remains free to engage in indefinite detention not permitted by any statute at all. Opp. at 16. The distinction is absurd.

Boumediene has made this point insuperable for the government in cases involving Guantánamo detainees, for there is no longer any question that the Constitution's safeguards against indefinite executive detention run to Guantánamo. The majority wrote: "We do hold that when the judicial power to issue *habeas corpus* properly is invoked the judicial officer must have adequate authority to . . . formulate and issue appropriate orders for relief, including, if necessary, an order directing the petitioner's release." 128 S. Ct. at 2271. The Court then held that the judicial power to order *habeas* relief properly is invoked by a Guantánamo prisoner like Parhat. *Id.* at 2274. In the typical case, release would not be necessary, as a prevailing prisoner could be transferred to his home country. But there is no question that the Supreme Court, with full view of the government's territorial arguments about Guantánamo, ordered that release is available in a case like this. Thus, while the full extent of constitutional protections available to aliens at Guantánamo remains to be tested, it is clear that the Constitution runs there for purposes of release, because the Supreme Court expressly stated that it did. In law, there is no barrier left (as, *arguendo*, there might have been when Judge Robertson decided *Qassim*) to application of the rule of *Clark* and *Zadvydas* here.

4. The government argues that Parhat "has no right to be released into a country where he [has] no right to be admitted" and that this Court "cannot force his admission into an[] unwilling country, including the United States." Opp. at 19, 4. To the contrary, that is *exactly* what *Clark* and *Zadvydas* instruct. The United States did not "willingly" accept either the physical arrival or the parole of inadmissible, unlawful, criminal aliens in *Clark*, but rather was ordered to do so by a *habeas* court. *Clark*, 543 U.S. at 386-87. Putting aside the fact that Parhat is not a criminal (having never been charged with any crime), the difference between the *Clark* petitioners and Parhat is all to Parhat's benefit. The *Clark* petitioners illegally sought out our territory, while Parhat was brought here illegally. If the men who arrived here without any legal right to do so in *Clark* are afforded a *habeas* right to release in the United States, *a fortiori* a man brought here by the jailer must be. In any event, the Supreme Court in *Boumediene* has since abrogated this distinction—extending to Parhat in Guantánamo the same *habeas* remedy the

Clark petitioners secured to themselves by their unlawful entry into the United States. The government's "willingness" to accept Parhat—who requests *lawful habeas* parole—matters little where the Constitution is concerned.

5. The government cites *Shaughnessy v. United States ex rel. Mezei*, 345 U.S. 206 (1953), the decision—roundly criticized at the time and ever since, *see generally* Charles D. Wessleberg, *The Exclusion and Detention of Aliens: Lessons from the Lives of Ellen Knauff and Ignatz Mezei*, 143 U. PA. L. REV. 933 (1995)—that stranded Ignatz Mezei at Ellis Island, potentially indefinitely. It arose during a period not unlike our own, when a single word ("communist") prompted such fear and revulsion that few trifled to inquire whether, in a given case, the word fairly described the person branded with it. Justice Jackson—who knew something of indefinite detention, having opened for the prosecution at Nuremberg by discussing what indefinite detention did to Germany[12]—filed a dissent eerily predictive of our current national folly. "Fortunately it still is startling, in this country, to find a person held indefinitely in executive custody without accusation of crime or judicial trial," it began. 345 U.S. at 218. It continued: "Quite unconsciously, I am sure, the Government's theory of custody for 'safekeeping' without disclosure of charges, evidence, informers or reasons, even in an administrative proceeding, has unmistakable overtones of the 'protective custody' of the Nazis more than of any detaining procedure known to the common law." *Id.* at 226. Three others joined him. Several points bear noting here.

First, *Mezei* does not control this case. Unlike Parhat and the others imprisoned at Guantánamo, Mezei left the U.S. voluntarily and returned, voluntarily, without a visa. Mezei also sought, at least initially, an immigration-type remedy: admission. His *habeas* claim came later. The government apparently believed of Mezei that he was a "communist." Here the Court of Appeals has determined that the government's evidence provides no basis for its

[12] 2 TRIAL OF THE MAJOR WAR CRIMINALS BEFORE THE INTERNATIONAL TRIBUNAL 110-11 (1947). The indictment alleged that the defendants used "protective custody" to make the regime "secure from attack and to instill fear in the hearts of the . . . people." *Id.* at 34-35.

imprisonment of Parhat and the government has waived its right to litigate the issue further. There is a material difference between a petitioner, such as Mezei, who comes to the threshold, knocks on the door, is barred from admission, is detained simply because he got to a place from which he cannot be sent anywhere, and now seeks *habeas* to enter, and a petitioner such as Parhat, who was brought against his will to a place under U.S. control by the government, and who now cannot be released through no fault of its own. The Executive cannot unilaterally and unlawfully bring someone to a prison, and then complain that its own discretionary authority over immigration matters prevents it from freeing the prisoner.[13] Respondent's current problem is of its own making.

Second, *Zadvydas* and *Clark* have made it impossible to extend *Mezei* to this case. Parhat does not deny that the Executive can exclude. What the Executive cannot do, per *Zadvydas* and *Clark*, is detain Parhat indefinitely pending expulsion or exclusion. Whatever the law was before *Zadvydas* and *Clark*, the law thereafter is that in a direct clash between immigration law and *habeas* rights, *habeas* wins. In each of those cases the petitioner (who suffered far less than Parhat has suffered) achieves physical presence, but without legal right, because the only alternative is detention.

Nor can *Mezei* bar relief to Parhat after *Boumediene*. *Boumediene*'s core principle is that the separation of powers embedded in the Constitution's structure and design demands *habeas* and a judicial branch that will effectively block overreaching by the Executive in cases of unwarranted intrusion into liberty. This principle is lost without the *habeas* remedy of release. This principle is the central focus of section III.A of the *Boumediene* decision and of the authorities cited therein. 128 S. Ct. at 2244-46. "[T]he writ of *habeas corpus* is itself an

[13] Mezei and the petitioner in *United States ex rel. Knauff v. Shaughnessy*, 338 U.S. 537 (1950), also cited by the government, both were eventually released into the United States. Charles D. Wessleberg, *The Exclusion and Detention of Aliens: Lessons from the Lives of Ellen Knauff and Ignatz Mezei*, 143 U. PA. L. REV. 933, 954, 963-64 (1995). "Once the government was required to justify its exclusion decision with substantial and reliable evidence, in an open proceeding, Knauff gained admission into the United States." *Id.* at 964. Once he got a hearing, Mezei was paroled into the United States by the Attorney General, although he was never admitted as a citizen or permanent resident. *Id.* at 984.

indispensable mechanism for monitoring the separation of powers. The test for determining the scope of this provision must not be subject to manipulation by those whose power it is designed to restrain." *Id.* at 2259. The Respondent's assertion of an entitlement to unilateral decision-making "serves only to *condense* power into a single branch of government," *Hamdi v. Rumsfeld*, 542 U.S. 507, 536 (2004), in contravention of *Boumediene*'s most pressing concern—the need to have a judicial remedy against executive overreaching during one of those "pendular cycles" when the Executive has gone too far. Thus, separation of powers principle demands a remedy here.

Granting the relief sought by Parhat would not conflict with statutory law or usurp the immigration authority of the political branches. To hold otherwise would lead to the conclusion that *habeas* itself is an unconstitutional violation of separation of powers. Every time the writ is granted, a court orders the Executive to release someone that it, in the exercise of its prerogatives, had chosen to imprison. That has always been the essence of separation of powers—checks and balances operating precisely as they should. If the Executive is found to have detained someone illegally it is subject to an enforceable judicial order that the individual be released if the illegality cannot be promptly remedied. *Cf. United States v. Nixon*, 418 U.S. 683, 703-05 (1974).

Moreover, *Boumediene* makes plain that Parhat has the same constitutional *habeas* right as any alien in the lower forty-eight. 128 S. Ct. at 2262. *Mezei* never wrestled with this point, and *Boumediene*, at least as applied to stateless Guantánamo prisoners, effectively overrules *Mezei*. *See also Bell v. Hood*, 327 U.S. 678, 684 (1946) ("[W]here federally protected rights [are threatened], it has been the rule from the beginning that courts will be alert to adjust their remedies so as to grant the necessary relief.").

E. The Government's Immigration Argument Fails Under the Suspension Clause.

The government's argument that certain immigration statutes (as well as *Mezei* and other immigration-related cases[14]) bar this Court from ordering Parhat released to the United States, *see* Opp. at 13-14, must fail under Art. I, § 9, cl. 2 of the Constitution, which prohibits Congress from suspending *habeas* except in cases of invasion or rebellion. The government's argument would eliminate release, thereby creating the same structural defect that *Boumediene* held infected the DTA.

This Court has jurisdiction over Parhat's *habeas* case, *see Rasul v. Bush*, 542 U.S. 466 (2004), and the writ runs to Guantánamo, where Parhat has the constitutional right to invoke it, *see Boumediene*, 128 S. Ct. at 2262; *Parhat*, 2008 WL 257697 at *15. Judicial power to order release clearly is a *sine qua non* of *habeas*, for the absence of an express release provision in the DTA was an aspect of the Supreme Court's finding of its inadequacy as a substitute. *Boumediene*, 128 S. Ct. at 2271-72. The release power is the first attribute of *habeas* considered in *Boumediene*'s adequate-substitution analysis. *Boumediene* holds that this Court may order release of a Guantánamo detainee where necessary to relieve unlawful detention. *Id.* at 2271; *see Parhat*, 2008 WL 2576977 WL at *15 (there is "no question" of this Court's release power).

The Executive has no constitutional power over immigration matters, but only those powers delegated to it by the Congress. Article II of the Constitution says nothing of immigration. The Constitution confers immigration power on Congress alone. U.S. CONST. art. I, § 8, cl. 4; *Fiallo v. Bell*, 430 U.S. 787, 792 (1977) (Congress has power over admission of aliens). Thus the government's proposition is that Congress, by delegating immigration authority to the Executive, has barred Parhat's release under *habeas* altogether. That proposition frames the question as a pure violation of the Suspension Clause analysis—for it necessarily implies that through immigration law, Congress may deprive petitioner of the benefit of the writ.

[14] The other immigration cases cited by the government, *see* Opp. at 13, are inapposite. All involved petitioners detained pursuant to an immigration statute providing for the exclusion of certain classes of people. In each case, petitioners challenged the validity of the immigration statute preventing their admission, and the Court's inquiry was limited to the statute's validity. Parhat is not detained pursuant to an immigration statute, and does not challenge the legality of a statute preventing his admission.

The principle of constitutional avoidance requires that the immigration laws not be read, as the government would read them, to bar Parhat a release remedy. *See INS v. St. Cyr*, 533 U.S. 289, 300 (2001). Nor may they be read to leave an unreviewable discretion in the Executive to hold Parhat until it deems a transfer convenient. That would reverse the powers of the coordinate branches inherent in and essential to the design and structure of the Constitution: that the judicial branch has power, in a discrete case or controversy, to enter an effective remedy limiting overreaching by the Executive. *Boumediene*, 128 S. Ct. at 2277. An absolute statutory bar, and thus an unconstitutional suspension, is precisely what the government suggests. Without release into the United States under the unusual circumstances of this case, there is no release—or remedy—at all. That is why the government's construction here must be rejected, for inevitably it would force the Court to construe the statutes in question as a violation of the Suspension Clause. This principle is a narrow one; as a practical matter it will apply in few cases. A *habeas* judge has broad discretion in fashioning a remedy. For example, he may conclude, and in most Guantánamo detainee cases would conclude, that a detainee should not be released to the United States because a transfer to the detainee's home country, or some other country is safe and available. And this Court need not reach the question whether a *habeas* judge would have discretion to impose further detention in the United States (or at any rate, substantial limitations on liberty), because of a real and present danger, demonstrated by evidence, that release would threaten the public interest.[15] In this case, all of the evidence was reviewed by the Court of Appeals, and the entire record reviewed there—which remains the only record here—was held to support release. *Parhat*, 2008 WL 2576977 at *14. Thus, in this unusual case, the government's construction of the immigration laws as barring a release to the United States amounts to an

[15] *But see* cases cited in the Opening Brief at 20-21 applying the *Martinez/Zadvydas* rule that detained deportable aliens "must presumptively be released into American society after six months," *Jama v. Immigration & Customs Enforcement*, 543 U.S. 335, 347-48 (2005) (recognizing the rule), even where the government raised issues concerning the alien's mental stability, risk to the community, and the protection of national security. *See also Zadvydas*, 533 U.S. at 691 ("[W]e have upheld preventive detention based on dangerousness only when limited to specially dangerous individuals and subject to strong procedural protections.").

unlawful suspension, and must be rejected.

F. *Munaf* Does Not Bar Parhat's Requested Relief.

Munaf v. Geren, 128 S. Ct. 2207 (2008), does not support the government's position, and in fact cuts against it. There the Supreme Court considered two consolidated cases (brought by petitioners Munaf and Omar) concerning the availability of *habeas* relief arising from the detention of U.S. citizens by an international coalition force operating in Iraq ("MNF–I"). *Id.* at 2213. Both petitioners voluntarily traveled to Iraq, were detained by MNF-I within the sovereign territory of Iraq as threats to Iraqi security, and were charged with committing serious crimes in Iraq. *Id.* at 2214.[16] Both conceded that, if they were not in MNF–I custody, Iraq would be free to arrest and prosecute them under Iraqi law. *Id.* at 2221. The Supreme Court concluded that *habeas* jurisdiction extends to U.S. citizens held overseas by U.S. forces operating as part of a multinational coalition, *id.* at 2218, and held that (i) the lower courts in *Munaf* had erred in dismissing the case for lack of jurisdiction, and (ii) the lower courts in *Omar* had erred in enjoining Omar's transfer to Iraqi custody for criminal proceedings under Iraqi law, *id.* at 2219.

Rather than reverse and remand, the Court addressed the merits of petitioners' requests for an injunction prohibiting the U.S. from transferring them to Iraqi custody for prosecution under Iraqi law, and "release"—but only to the extent that release would not result in "unlawful" transfer to Iraqi custody. 128 S. Ct. at 2220. The Court held that a U.S. court may not exercise *habeas* jurisdiction to enjoin U.S. forces from transferring individuals detained within a foreign sovereign's territory to that sovereign's government for criminal prosecution because doing so "would interfere with Iraq's sovereign right to 'punish offenses against its laws committed within its borders.'" *Id.* at 2220 (quoting *Wilson v. Girard*, 354 U. S. 524, 529 (1957)).

In so doing, the Court affirmed the bedrock principles that *habeas* is "at its core a remedy for unlawful executive detention," and that "[t]he typical remedy for such detention is, of course,

[16] Among other duties, MNF–I forces maintain custody of individuals who pose a threat to Iraq's security, even though Iraq is responsible for the arrest and imprisonment of those who violate its laws, because Iraq's prison facilities have been destroyed. 128 S. Ct. at 2213.

release." *Munaf*, 128 S. Ct. at 2222 (citations omitted). The petitioners in *Munaf* were held by U.S. forces for the singular purpose of transfer into a foreign sovereign's criminal justice system. Munaf had been convicted in Iraqi criminal proceedings and Omar would have been the subject of ongoing criminal proceedings but for the injunction entered by the district court. *Id.* at 2214-15. The Court held that a *habeas* court could not order release from criminal prosecution by a foreign sovereign for crimes committed on its soil. *Id.* at 2228.

None of that is here. There is no issue of foreign sovereignty. Parhat did not voluntarily transport himself to his place of imprisonment. He has been charged with no crime. And he seeks no such remedy. He is held far from any war zone in a place to which, per *Boumediene*, *habeas* runs, and he is held by *this* sovereign, who took him there, and who, per *Boumediene*, is answerable to the decrees of this Court. *Munaf* is a peculiar case, limited to its facts. It does not bar relief here.

G. Geneva Conventions

The government also takes issue with Parhat's reliance on the Fourth Geneva Convention. Opp. at 18-19 n.3. Parhat does not rely on the Geneva Conventions as a source of rights authorizing his release into the United States, but as further support for his argument that the government cannot incarcerate him indefinitely while it searches, year after year, for another country willing to take him. By means of the treaty, the government has undertaken to release him into the United States during its repatriation efforts and to tolerate his presence here while it works to facilitate his release. A grant of that relief by this Court cannot be deemed inequitable.

H. The Path Forward

This Court, the Court of Appeals, and the Supreme Court of the United States have not been engaged in a six-year charade. Article III demands a remedy, particularly in a case of *habeas corpus*. After *Boumediene*, *Parhat*, and the government's abandonment of any attempt to improve its record, the remedy must be release. We believe we have shown that the effort to rehash the "record" may be rejected on its face. In the alternative, to the extent the Court deems any factual point material, we have shown that it must afford Parhat his rights of presence,

confrontation and traverse under 28 U.S.C. §§ 2241 and 2243, and the right to call witnesses and offer evidence thereunder.

When it ordered that, in the event the record did not materially change, the only appropriate remedy for Parhat was transfer or release, the Court of Appeals had studied intimately the government's entire record about this petitioner. It fully comprehended and understood his stateless dilemma when it wrote, *about this very habeas proceeding*, that "there is no question but that the court will have the power to order him released." 2008 WL 2576977 at *15. The path forward is for this Court and the litigants to implement that release.

We concede that there is a substantial practical reason why this Court may wish to implement the Circuit's ruling in stages. The government is authorized to transfer Parhat to an appropriate and safe third country. And nothing would prevent it from effecting a transfer by exercising its power to deport (again, to a proper country) even after Parhat were physically present. Accordingly, a practical balancing suggests that he should first be paroled here, under such reasonable conditions of release as the Court imposes. The Court may grant to the government a reasonable time to attempt to implement an appropriate transfer before final judgment is ordered in his *habeas* case. His presence here would, as a practical matter enhance chances of a transfer,[17] and the Court might appropriately impose conditions[18] to protect the government's legitimate interest in so doing. This must happen promptly. The urgency of relief is only underscored by this Court's recent determination that it may not intrude judicially into the conditions of confinement in Guantánamo.

CONCLUSION

Accordingly, Parhat requests:

a. That the Court immediately schedule a parole hearing, at which Parhat shall be present, to consider and implement terms of his temporary release, with the Court thereafter to

[17] Foreign governments would be able to interview him directly—a key component of the asylum process. Now they cannot. And Parhat might at least begin to be free himself from the Guantánamo taint.

[18] It would be reasonable for Parhat to report regularly to immigration officials.

schedule such further proceedings as may be appropriate or necessary in connection with the motion for judgment; and that,

b. Thereafter the Court schedule such hearings and proceedings as may be appropriate, at which Parhat shall be present, in order that final release may be implemented; and

c. In either case, Parhat be afforded a fair opportunity (i) to call upon the Government to prove with evidence any of the points made in the Opposition and deemed by this Court to be material, (ii) to be present for such proof, and (iii) to be afforded a fair opportunity to respond and refute all such efforts with evidence of his own, as set forth above; and

d. That he be granted such other and further relief as may be just and proper.

Respectfully submitted,

DATED: August 15, 2008

/s/ Susan Baker Manning

Susan Baker Manning
Catherine Murphy
BINGHAM McCUTCHEN LLP
2020 K Street, N.W.
Washington, D.C. 20006
Telephone: (202) 373-6000
Facsimile: (202) 373-6001
susan.manning@bingham.com
catherine.murphy@bingham.com

Sabin Willett
Neil McGaraghan
Rheba Rutkowski
Jason S. Pinney
BINGHAM McCUTCHEN LLP
One Federal Street
Boston, MA 02110-1726
Telephone: (617) 951-8000
Facsimile: (617) 951-8736
sabin.willett@bingham.com
neil.mcgaraghan@bingham.com
rheba.rutkowski@bingham.com
jason.pinney@bingham.com

Counsel for Huzaifa Parhat

EXHIBIT K

ONE HUNDRED TENTH CONGRESS

CONGRESS OF THE UNITED STATES

COMMITTEE ON FOREIGN AFFAIRS
U.S. HOUSE OF REPRESENTATIVES
WASHINGTON, DC 20515

TELEPHONE: (202) 225-5021
HTTP://WWW.FOREIGNAFFAIRS.HOUSE.GOV/

June 19, 2008

The Honorable Robert Gates
Secretary of Defense
Department of Defense
4000 Defense Pentagon
Washington, DC 20301-4000

Re: Transfer of Uighur Prisoners Out of Camp 6 and parole into the United States

Dear Mr. Secretary:

On the basis of the Subcommittee on International Organizations, Human Rights, and Oversight's investigation into detention at Guantanamo Bay, we request that the Uighur detainees at Guantanamo Bay promptly be paroled into the United States, and that while those arrangements are being made, those Uighurs being held in Camp 6 immediately be transferred from Camp 6 to Camp 4.

The Uighurs are friends of the United States, and based upon the facts of their political inclinations and struggle against the Communist Chinese regime, they should not be grouped, even in appearance, with the other detainees at Guantanamo Bay. Accordingly, Mr. Secretary, we are requesting that your office intervene to put this transfer and parole into motion.

The parole requested in this letter would accomplish the Uighurs' physical transfer to the continental United States, but would not, of itself, constitute a formal grant of asylum. We have consulted with Rabiya Kadeer, President of the Uighur American Association, and have been informed the Uighur community is willing to support these individuals during their stay in the United States.

We look forward to the opportunity to speak with your office about the means for carrying out our request. Please respond to this letter by July 19, 2008. Please contact either Natalie Coburn or Paul Berkowitz of the Subcommittee staff at (202) 226-6434 if you need more information.

Sincerely,

BILL DELAHUNT
Chairman
Subcommittee on
International Organizations,
Human Rights, and Oversight

DANA ROHRABACHER
Ranking Member
Subcommittee on
International Organizations,
Human Rights, and Oversight

cc: Sandra Hodgkinson
Deputy Assistant Secretary of Defense for Detainee Affairs
United States Department of State